Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1998

MIE MAKITA HELFFRICH

Petitioner,

v

ATLANTIS SUBMARINES, INC. and ATLANTIS SUBMARINES HAWAII, INC.

Respondents.

Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAY LAWRENCE FRIEDHEIM
(Counsel of Record)
ADMIRALTY ADVOCATES
820 Mililani Street, Suite 503
Honolulu, Hawaii 96813
Tel: (808) 545-5454

JOHN R. REMIS, JR.
547 Halekauwila Street
Suite 118
Honolulu, Hawaii 96813
Tel: (808) 524-4343

Attorneys for Petitioner

112 pp

QUESTIONS PRESENTED

1. Whether fees for services rendered by the treating physician medical expert witness in maritime maintenance and cure litigation may be shifted to the losing shipowner pursuant to the general maritime law contractual doctrine of maintenance and cure or 28 U.S.C. §§ 1821(b) or 1920.

2. Whether the vessel owner's offering the injured seawoman light duty work and then firing her suspends the obligation to pay maintenance while the seawoman continues with the medical treatment requiring the seawoman to pay her own attorney's fees to obtain the maintenance from the maintenance award she receives.

LIST OF PARTIES

Petitioner: Mie Makita Helffrich

Respondents:

1. Atlantis Submarines, Inc.
2. Atlantis Submarines Hawaii, Inc.

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PETITION FOR WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Mie Makita Helffrich respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Order of the Court of Appeals (Appendix at App.A-1). The Memorandum of the Court of Appeals (Appendix at App. B-1). The Satisfaction of Judgment (Appendix at App. C-1). The Judgment in a Civil Case, recorded at the Bureau of Conveyances (Appendix at App. D-1). The District Court's Order Adopting Report of Special Master on Defendants' Opposition to Plaintiff's Amended Bill of Costs and Motion to Strike (Appendix at App. E-1). The District Court's Report of Special Master on Defendants' Opposition to Plaintiff's Amended Bill of Costs and Motion to Strike, ruling of the District Court (Appendix at App. F-1). The District Court's Order Denying Plaintiff's Motion for Reconsideration of the Court's Findings of Fact and Conclusions of Law (Appendix at App. G-1). The District Court Judgment in a Civil Case (Appendix at App. H-1). The District Court's Finding of Fact and Conclusions of Law and Order (Appendix at App. I-1).

JURISDICTION

The Court of Appeals entered its Order on January 4, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

I. 28 U.S.C. § 1920. A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title;

II. 28 U.S.C. § 1821

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.

(b) A witness shall be paid an attendance fee of $40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

III. Federal Rules of Civil Procedure 54(d)

In part: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs."

STATEMENT OF THE CASE

MIE MAKITA HELFFRICH ("Helffrich") is a permanent resident alien of the United States of America from Japan. At the time of her employment, as a seawoman, she had an "F-1" Student Visa and Work Authorization that permitted her to be

employed in the United States until January 28, 1996. (App. I-2). She worked from June of 1995 to January 30, 1996 for Atlantis Submarines as a bilingual submarine attendant on regular voyages from Honolulu. (App. I-5).

Seawoman Helffrich reported an injury to her right shoulder from opening the submarine hatches on October 2, 1995. (App. I-7). She sought medical treatment and was placed on light duty work by her employer on November 14, 1995. (App. I-7). Helffrich was taken off work on December 12, 1995 to December 22, 1995, on doctor's orders when she informed the doctor that she still had to regularly open the hatch which had caused her injuries. On January 16, 1996, the Defendants stopped paying Helffrich's maintenance. (App. I-25).

On January 22, 1996, Atlantis contacted Helffrich's doctor's office, to evaluate whether she would be able to perform the duties if they moved her to the non-seawoman's job of "ticketing agent". The doctor approved the employer's request for modified duty without seeing her or speaking to her about this. (App. I-11). On January 23, 1996, Atlantis contacted Helffrich and told her that she could return to work as they had arranged light duties for her and that her doctor had cleared her for the proposed light duties. (App. I-12). Helffrich tried to confirm the return to work with her doctor, but he did not return her call. (App. I-13).

On January 22, 1996, George Ann Skandis, Atlantis' Director of Human Resources, reminded Helffrich that her employment authorization card would expire on January 28, 1996 and that her employment would be terminated on January 28, 1996, unless she provided proper work authorization documents. (App. I-14).

To secure the renewal of her IRS work permit before January 28, 1996, when it was to expire, Helffrich consulted

with her immigration attorney, the Department of Health and the INS. She advanced her planned wedding ceremony to January 23, 1996, thereby qualifying in another way for her work Visa status.

On January 26, 1996, Helffrich faxed a copy of her new work authorization card to Atlantis'corporate offices late in the afternoon. (App. I-15). Atlantis personnel could not read the face of the work authorization card and called Helffrich and left a message on her answering machine which said she should bring in the original work authorization. App. I-16). Helffrich brought the INS Card to her regular work place at the pier side work facility and showed it to her immediate supervisor. (App. I-17). Atlantis then fired Helffrich because she did not produce an original INS Card by their deadline at their corporate offices. The shipowner refused to pay Helffrich any maintenance after January 16, 1996. The shipowner continued to pay for some of the medical care and receive reports from the doctor for every treatment visit. (App. I-19).

At trial, the District Court found that Helffrich was entitled to 403 days of maintenance payments during the period that she was still receiving treatment for her injury. This period extended from the date of her leave from work for her injury on January 16, 1996 to the date of her last examination by her doctor on December 27, 1996, for a total of 347 days. (App. I-25).

Based upon the testimony of her treating doctor, the Court found that Helffrich was entitled to maintenance during her treatment, which resumed on May 7, 1998 and ended a short time after the trial on June 30, 1998, and totaled 55 days, and that Helffrich was entitled to cure payments for the same period, in order for her to reach maximum medical cure.

In a bench trial before U.S. District Court Judge Helen Gillmor on May 20, 1998 at 9:00 a.m., the seawoman called her treating doctor, a physician licensed to practice medicine in the State of Hawaii. Dr. Portner testified regarding his treatment of the Plaintiff Mie Helffrich from August 26, 1996, up until the time he testified in Court. He testified about her medical treatment and the causation of her illness and its connection to the work she had performed on the vessel and the outstanding cure related medical bills.

The shipowner began their cross-examination of the doctor at about 10:00 a.m., and he testified until lunch recess at about 12:30 p.m. The doctor was called back by the shipowner at 1:45 p.m. on May 20, 1998, and was required to testify until 4:15 p.m., when the Court adjourned for the day. The doctor billed the seawoman $4,402.95 for the testimony. The District Court awarded the seawoman $14,070.00 for the 403 days of maintenance at $35 a day and ordered the shipowner to pay the outstanding cure bills including those owed to the testifying doctor. The District Court declined to award attorney's fees and certain costs including the expert medical testimony cost of the seawoman's treating doctor.

The Court awarded maintenance at a rate of $35.00 per day, according to Helffrich's un-rebutted testimony of her living expenses in Honolulu while receiving cure. The District Court found that Helffrich was due maintenance in the sum of $14,070.00. (App. I-26).

The Court applied the legal standard regarding attorneys' fees, "a plaintiff may be awarded attorneys' fees if the ship owner had been wilful and persistent in its failure to investigate the plaintiff's claims or to pay maintenance". (App. I-26). The District Court ordered the seawoman to pay her own attorney's fees and most of her costs including her treating doctor's expert medical testimony. The fees and costs were paid from her recovery of maintenance, leaving her with a net maintenance

award of $.73 per day for the 403 days. The District Court ruled that attorney's fees were not appropriate because the shipowner promptly investigated plaintiff's maintenance and cure claims and offered to provide appropriate alternative, non seawoman work after plaintiff was injured. (App. I-27). On August 7, 1998, the Court denied Plaintiff's Motion for Reconsideration on the attorneys' fees question. (App. G-1). The Court found that attorneys fees were not appropriate as Plaintiff failed to provide evidence of any wilful or persistent behavior regarding the non-payment of maintenance and cure that would warrant an award of attorney's fees. (App. G-7).

Plaintiff's entitlement to costs was referred to the Magistrate Judge Barry Kurren to act as a Special Master. On October 2, 1998, a Report of Special Master on Defendants' Opposition to Plaintiff's Amended Bill of Costs and Motion to Strike was filed. (App. F-1). Plaintiff sought $6,791.68 for trial costs. (App. F-4). The Special Master recommended the payment of $1,713.44 in costs by the shipowner. The Report specifically denied Plaintiff's request to pay an expert witness fee to the seawoman's testifying, treating doctor in the amount of $4,402.95. (App. F-8). The Special Master awarded $40.00 for the testimony, citing case law that a federal court may not exceed this limit without explicit statutory or contractual authorization. (App. F-9).

The Magistrate in denying Plaintiff's request for $4,402.95 for the treating physician's trial testimony charges, stated that "The Supreme Court has made it clear that unless the expert is court appointed, witness fees shall be taxed at the statutory rate pursuant to 28 U.S.C. § 1821 (b), now $40 per day. Crawford Fitting v. J.T. Gibbons, Inc., 107 S. Ct. 24 92 (1997). "A Federal Court may not exceed this limit without explicit statutory or contractual authorization." Aceves v. Allstate Insurance Company, 68 F.3d 110, 116 (9th Cir. 1995). U.S. District Court Judge, Helen Gillmor, in her November 10, 1998 Order Adopting Report of Special Master on Defendant's opposition to Plaintiff's amended bill of costs

and motion to strike, stated that under FRCP 54 (b), Courts do not have discretion to tax costs. Costs are limited to tax and costs that are delineated in 28 U.S.C. § 1920, citing Crawford Fitting Company, *supra*, 482 U.S. at 445. (App. E-3). Judge Gillmor's order states that "The Supreme Court unequivocally holds that absent explicit or contractual authorization for the taxation of expenses of the litigants witnesses as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." (App. E-3). She further stated that "the Court does not have discretion to tax the treating physician's full cost as an expert." (App. E-4). Judgment was entered on June 11, 1998. (App. H-1). The seawoman appealed to the Ninth Circuit and the shipowner did not post a bond or security to stay the Judgment.

The Ninth Circuit Court of Appeals found that the District Court correctly ruled that it had no authority to award costs for witnesses beyond that prescribed in 28 U.S.C. § 1821 and § 1920, again citing Crawford Fitting Company, and Acezes. (App. B-3). Both the District Court Judge and the Ninth Circuit recognized the "contractual authorization" of the prohibition on fee shifting of a litigant's witness costs but did not determine if the contract for maintenance and cure provides this relief.

REASONS FOR GRANTING THE WRIT

A. MAINTENANCE AND CURE IS A CONTRACTUAL OBLIGATION.

The obligation of the shipowner to provide for the maintenance and cure of seawoman becoming ill or injured during the period of their service is an implied contractual obligation imposed by the general maritime law as one annexed to the employment. Agular v. Standard Oil Company, 318 U.S. 724, 730, 87 L.Ed. 1107, 1113, 63 S.Ct. 930 (1943); De Zon v. American President Lines, Ltd., 318 U.S. 660, 87 L.Ed. 1065, 63 S.Ct. 814 (1943); Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 77 L.Ed. 368, 53 S.Ct. 173 (1932).

It is an incident to the status of the seaman in the employment of his ship and is without heed to any expression to the will of the contracting parties. O'Donnnell v. Great Lakes Dredge & Doc Co., 318 U.S. 36, 42, 87 L.Ed. 596, 601, 63 S.Ct. 488 (1943).

Maintenance and cure is "a contractual form of compensation given by the General Maritime Law." To seamen who fall ill or are injured in the service of their vessels. Tate v. American Tug, Inc., 634 F.2d 869 (5th Cir. 1981); Lancaster Towing, Inc. v. Davis, 681 F. Supp. 387, 389 (N.D. Miss. 1958); McCorpen v. Central Gulf Steamship Corp., 396 F.2d 547, 548 (5th Cir. 1968). It is not only a contractual right but it is a right under the General Maritime Law accorded to seamen by long tradition in recognition of the special dangers and sacrifice which characterizes maritime employment. Virginia A. McDaniel, *Recognizing Modern Maintenance and Cure as an Admiralty Right*, IV Ford International L.J. 669 (1991).

Whether maintenance and cure falls into the classification as a contractual or delictual duty that belongs to an independent category has never been determined with definiteness. Mr. Justice Cardozo in Cortes, *supra*, stated that: contractual it is in the sense that it has its source in the relation which is contractual in origin . . . it is imposed by law, arising out of the nature of his employment and his relationship to the vessel. It is not subject to limitation and liability since maintenance and cure, is an incident of the employment relation, and falls into the contract category. Murry v. New York C.R. Co., 171 F. Supp. 80 (D.C.N.Y. 1959), aff'd (287 F.2d 152) (2nd Cir.), cert denied, 366 U.S. 945. The seaman's right to maintenance and cure, and the vessel owner's obligation to furnish it cannot be abrogated by agreement of the parties.

In Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed. 2d 88 (1962), the Court addressed an appeal that had relied

on conventional contract rules that an obligee cannot recover attorney's fees for a breach of contract by the obligor. When the Court reversed, it held that the seaman was entitled not only to his actual damages, but also to an award of attorney's fees because the vessel owner's default was "callous" as well as "willful and persistent." The recovery may also include necessary expenses.

The ship owner furnishes each seaman with a bunk, food, and medical attention as an obligation which is sometimes called "found". Thus, maintenance, namely food and lodging ashore during a period of recovery from an illness or injury is the landside equivalent of "found" aboard the vessel. Alexandervich v. Gallagher Bros. Sand & Gravel Corp., 298 F. 2d 916 (2nd Cir. 1961).

B. TO DETERMINE WHETHER COURT CREATED CONTRACT BETWEEN THE SHIPOWNER AND THE SEAWOMAN FOR MAINTENANCE AND CURE INCLUDES THE COSTS OF ENFORCING THE REMEDY.

While there is not congressional statute to construe the doctrine of maintenance and cure is reinforced by the Shipowner's Liability Convention, 54 State. 1693, ratified October 29, 1939. Article I of this convention obliges shipowners to pay compensation to seamen who are injured or fall sick during their employment. Article IV provides that the "shipowner shall be liable to defray the expense of medical cure and maintenance until the sick or injured person has been cured." Thus, enforcement of the duty to pay maintenance and cure is an international obligation of the United States. Vella v. Ford Motor Co., 421 U.S., 95 S.Ct. 1381, 43 L.Ed. 2d 682 (1975). The Convention refers to "defer" the expense. Does it include the cost of obtaining the payment? Do immigration laws supercede this obligation?

C. IN ORDER TO WIN A MAINTENANCE AND CURE CASE, THE TESTIMONY OF A PHYSICIAN IS ESSENTIAL.

This bench trial required the presentation of expert medical testimony by the seawoman's treating doctor in order to establish the facts necessary to obtain the District Court's order to pay the outstanding maintenance and cure. (App. I-25). The cost of putting on the case was quite substantial in relation to the recovery sought and a significant portion of the cost consisted of the $4,401.95 charged by the seawoman's treating physician for his testimony.

Whenever the seaman becomes ill or is injured in the service of the vessel even if the illness is not one associated with the seaman's occupation, a medical condition, heart problem, prior illnesses that reoccur or purely psychological problems, are then entitled to medical care if the seaman seeks it. Breese v. AWI, Inc., 823 F.2d 100 (5th Cir. 1987); Sammon v. Central Gulf S.S. Corp., 442 F.2d 1028 (2nd Cir. 1971). Who is going to testify about the illness and its relationship to the service of the vessel?

The report of the Special Master denied the charge and ordered that the doctor be paid $40 per day for his testimony. The District Court's Findings of Fact and Conclusions of Law were based on the testimony of the doctor. Without the testimony of a doctor there can be no finding of injury or illness for the necessary elements to prove a maintenance and cure claim.

The employer also has rights regarding maintenance and cure, they can file action under the declaration under the Declaratory Judgment Act, 28 U.S.C. § 2201, to determine its duty to pay maintenance and cure, Belle Pass Towing Corp. v.

Cheramire, 763 F. Supp. 1348 (E.P. La. 1991); Rowan Companies v. Griffin, 876 F.2d 26 (5th Cir. 1989), as well as when to terminate benefits, Ian Casta Towing, Inc. v. Davis, 681 F. Supp. 387 (N.D. Miss. 1988).

The origins of maintenance and cure can be traced to the earliest Maritime Law Digest and Sea Codes. It is found in the Laws of Oleron (Roll D'Oleron) introduced into England by Richard I the Lionheart upon his return from the Holy Land during his reign from 1189 to 1199. The Oceola, 189 U.S. 158, 169 (1903); Martin J. Norris, The Seamen as Wards of the Admiralty, 52 Mich. L. Rev. 479, 481 (1954). Etiene Cleirac gives credit to Eleanor: *Us Et Coutumes De La Mer 2* (1661 ed.), and seems to imply in the same passage, that Richard introduced the Rules to England. *The Law of Admiralty*, Gilmore and Black, 2d Ed. 1975, page 7, note 23.

The obligation of the vessel to provide maintenance and cure first appeared in American maritime law in Harden v. Gordon, 11 F. Cas. 480 (No. 6,047) (C.C.D. Me. 1823). See also Vella v. Ford Motor Co., 421 US 1, 3-4, 1975 AMC 563, 565 (1975) (stating that the duty to pay maintenance and cure encourages maritime commerce and assures the well being of seamen).

In the United States, the scope of maintenance and cure was defined to a large extent at the beginning of the 19th Century by Justice Story. In Harden v. Gordon,, *supra*, De Zon v. American President Lines, Ltd., 318 U.S. at 667. Harden v. Gordon, *supra*, construed the seaman's contractual articles which contained a clause obligating the seaman to pay his own medical care in relationship to a Federal Statute compelling American vessels to carry medicine chests aboard ship for the purpose of supplying medical aid and relief to the sick and injured seamen. Act of July 20, 1790, c.29 § 8, 1 stat 135; Act of March 2, 1805, c. 88, 2 stat 330.

The vessel owner had argued that if the medicine chest was on board, the statute absolved it of any duty to provide and pay for medical services. Justice Story disagreed. Although the legislation exempted:

> The ship from the charge for medicine and attendance there is nothing that in the remotest degree affects the charge for board, lodging, and nursing, while the sick seaman is on shore. This accordingly remains a charge upon the ship and is to be born by the owner upon the principles of Maritime Law.

The statutory requirement was auxiliary to that of the Maritime Law and is a substantial benefit to seamen by enlarging the means of recovery. Maintenance and cure was brought in to American law through English Admiralty Courts which have a tradition of fee shifting different from ours. The meager award was meant to be kept by the seaman, and paid commensurate with the need. Otherwise, seamen have no workmens' compensation for injuries and illness on the job. Working as a seaman is the most dangerous occupation in America. Citing, Paul K. Chapman, *Trouble on Board: The Plight of International Seafarers*, N.Y. 1992.

In Aguilar v. Standard Oil Co., 318 U.S. 724, 730 (1943), the Supreme Court held a shipowner's liability for maintenance and cure to be among the "most pervasive" of all and that it was not to be defeated by restrictive distinctions nor was it to be "narrowly confined." Ambiguities or doubts concerning a shipowner's liability are to be resolved in favor of the seaman. Warren v. United States, 340 U.S. 523 (1951). Additions were made to the law of maintenance and cure by King John (1199-1216) and it was promulgated anew in the fiftieth year of Henry III (1266). The original intent of this law was for the seaman to actually get the maintenance and cure when it is needed.

The word "cure", was used with reference to the ship owner's obligation to furnish a sick or injured seaman with maintenance and cure, which means care. The word is derived from the Latin "cura" meaning care. Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528, 82 L. Ed. 993, 996, 58 S.Ct. 651 (1938). By "maintenance" what is meant is sustenance and a berth while aboard ship and the payment in cash to the ill or injured seaman for the cost of his board and lodging while ashore actually expended by him or the liability for which he incurs.

D. CAN A THOROUGH INVESTIGATION BY A SHIPOWNER RELIEVE THE SHIPOWNER OF THE CONSEQUENCES OF THEIR FAILURE TO PAY THE MAINTENANCE AND CURE OWED TO THE SEAWOMAN.

We are seeking to have answered by the Supreme Court whether or not the judicially created quasi-contractual obligation to pay maintenance and cure contains the contractual authorization for fee shifting in the taxation of treating doctor medical expert witness testimony expenses of a litigant's witness as costs within the discretion of the District Court. Some Courts have found that they do have the discretion to tax expert witness fees in excess of statutory permitted per diem witness fees when the testimony of experts was essential to elements of the case. Ackerman v. Western Elec. Co., 113 F.R.D. 143 (D.C. Cal. 1986); Feher v. Department of Labor and Indus. Relations, 561 F. Supp. 757 (D.C. Haw. 1983).

Not recognizing the contractual basis of maintenance and cure obligation, the District Court believed it did not have the discretion to tax the treating doctor's actual trial testimony costs as an expert witness and therefore, adopted the Special Master's Report. The Ninth Circuit affirmed this reasoning.

The shipowner was aware of the seawoman's continuing medical care and disability from her seawoman's position after

they fired her. The shipowner received medical reports from the treating doctor and took an active role in the medical care, approving physical therapy and diagnostic procedures such as an and arthrogram and MRI. The shipowner knew at the time when they terminated Helffrich's maintenance on January 16, 1996, that she was on not-for-fit-duty for duty status regarding her work as a Seawoman. (App. I-11).

The shipowner had a full authorization for release of all medical information from her treating doctor. Plaintiff made repeated demands for the payment of maintenance and cure on the shipowner through the course of proceedings. A couple of days before the trial started, the shipowner paid the outstanding medical bills, but not her maintenance. Querry, does the shipowner's payment of the outstanding cure bills on the eve of trial mean that they are not willful and recalcitrant regarding the second arm of the Vaughan, *supra*, requirement "to promptly pay"?

That is why they could call up her treating doctor and discuss confidential medical information regarding their employee. Releases are routinely obtained under the guise of being required of the seawoman to fulfill their obligation to provide current medical reports of their condition which is a prerequisite for the payment of cure or the disbursement of the maintenance commensurate with the need.

Helffrich then tried to get unemployment because she was fired by the shipowner while she was not-fit-for-duty. The seawoman's treating doctor provided a report for the unemployment hearing stating Helffrich was only eligible for light duty from January 31, 1996 to February 22, 1996. The shipowner sent representatives to the unemployment hearing in order to contest the seawoman's efforts to obtain unemployment benefits needed to support herself while she was off work and receiving medical care without any maintenance payments. The

State of Hawaii Unemployment Appeals Board denied the seawoman's unemployment claim. She was not able to return to work because of her injuries because Atlantis had "offered" her a light duty job before they fired her for not producing the proper INS paper work at the corporate offices location of her employer. The shipowner continued to refuse to pay Helffrich maintenance knowing that she had no other means of support.

The shipowner contacted her treating doctor and tried to return the seawoman to "light duty" as a translator knowing her work Visa was about to expire. The Director of Operations wrote a memo confirming this. (App. I-9). At the same time that they offered her the light duty non-seawoamn job, the shipowner wrote to the seawoman and informed her that she would be fired if she did not have a work Visa. She remained not fit for duty as a seawoman, and that status never changed for most of the year.

On January 30, 1996, the shipowner fired the seawoman even though she had timely obtained her Visa and had faxed a copy of it to the shipowner which was not necessary to be entitled to the maintenance and cure. Judge Gilmore dismissed the effect of "other employment" during her injuries, citing, Woods v. Diamond M. Drilling Co., 691 F.2d 1165 (5th Cir. 1982), cert denied, 460 U.S. 1069 (1983). (App. G-10). The shipowner apparently justified not paying the seawoman maintenance because they call it "Maintenance Wages" and believed they did not owe any more maintenance once they fired her. The District Judge found that the shipowner employer fulfilled its duty to pay maintenance provided they investigate the claim and offer alternative employment in a seawoman's job, even if they immediately fire the seawoman on the pretense that the seawoman was not qualified to work because of her immigration status. In fact, the seawoman had obtained the valid INS card and had faxed it to the office with a cover letter identifying the card. The shipowner claimed that the fax of the card was not

sufficiently legible and so therefore terminated her because of the shipowner's desire to comply with the immigration laws. (App. I-16). Firing the seawoman also terminated her employee health care coverage mandated by state law.

Helffrich filed a Complaint demanding maintenance and cure as well as other causes of action under the Jones Act and unseaworthiness. In addition to these maritime claims, the seawoman asserted claims for breach of an oral contract, wrongful discharge, intentional negligence, and intentional infliction of emotional distress. On September 23, 1996, Atlantis answered the Complaint and denied that Helffrich was entitled to maintenance and cure. The District Court ordered the shipowner to pay maintenance and cure on June 3, 1998. This was two-and-one-half years since they cut her off in January 1996. To collect her award, Helffrich finally had to garnish the bank account of the multi national corporate shipowner (App. I-6) to receive the awarded funds from the judgment 276 days after the Court Order. (App. C-1).

Upon receiving a claim for maintenance and cure, the vessel owner does not have to immediately start payment. The vessel owner is entitled to investigate and require corroboration of the claim. If after investigating the claim, the ship owner rejects that claim and in fact the seaman is due maintenance and cure, then the owner becomes liable not only for the maintenance and cure, but also for compensatory damages if there is an aggravation of the seaman's condition or if the seaman has to expend funds to obtain the remedy.

It is still a mystery though, what constitutes a reasonable rejection of a claim for maintenance and cure. In Morales v. Garijak, Inc., 829 F. 2d 1355 (5th Cir. 1987). In Morales the Fifth Circuit offered a definition of "reasonable behavior", if diligent

investigation indicates that the seaman's claim is not legitimate or if the seaman does not submit medical reports to document his claim.

For the seaman to meet his burden in sustaining his complaint for maintenance and cure, he needs to show (a) that he was a seaman, (b) that his illness or injury occurred, was aggravated or manifested itself while in service of the ship, (c) the wages to which he may be entitled to the end of the voyage, and (d) the expenditures or liabilities incurred by him, the medicines, nursing care, board and lodging, etc.

Our case has to do with the problems and the cost attendant to meeting the burden under section (b), regarding the illness or injury and need for medical testimony to accomplish this task. There is authority to the effect that trivial expenditures or expenses in connection with the seaman's maintenance and cure cannot be recovered. Saderman v. The Hawaiian Isles, 3 Haw. Dist. F. 94 (D.C. Haw. 1910); Mendoza v. Hupper, 1939 A.M.C. 1397 (E.D.N.Y. 1939); Dominguez v. Hupper, 1939 A.M.C. 1399 (E.D.N.Y. 1939). In these cases the equities were not on the side of the seaman and the Courts were considering the principle of de minimis non qurat lex (the law cares not for small things).

The granting or disallowance of costs and fees, is in the judicial discretion of Courts of Admiralty, and the widest latitude is often exercised. The Scotland, 118 U.S. 507, 30 L.Ed. 153, 6 S.Ct. 1174 (1886); The Lilly, 69 F.2d 898 (9th Cir. 1934). Equity principles are often applied depending upon the circumstances of the case and the hardship and oppression suffered by one of the litigants. The Quogue, 47 F.2d 873 (2nd Cir. 1931). Some Courts have held that withholding maintenance and cure because a demand was also made for personal injuries that a division of costs was appropriate. The City of St. Louis, 56 F. 720 (D.C. La. 1893).

A seaman's right to "maintenance and cure from the shipowner, includes the cost of medical care, food and lodging necessary for the seaman to reach the point of "maximum

recovery." Thomas J. Schoenbaum, Admiralty and Maritime Law, § 4-28 (2d ed. 1994). Does it include the costs of obtaining the remedy?

Vaughan v. Atkinson, 369 U.S. 527, 532, (1962), took up the question of when would the seaman get attorney fees for having to enforce his rights to maintenance and cure:

> "the respondents were callous in their attitude, making no investigation of [the seaman's] claim and by their silence neither admitting or denying it. As a result of that recalcitrance, [the seaman] was forced to hire a lawyer and go to court to get what was *plainly owed him* under laws that are centuries old."

Id. at 531.

The shipowner has a *duty* to promptly investigate a seaman's claim for maintenance and cure. Does investigation fulfill the duty to promptly pay? Is there a separate duty to promptly pay?

The District Court denied the seawoman Helffrich her request for attorneys fees stating:

> "17. In this case, attorneys' fees are not appropriate as Atlantis promptly investigated Plaintiff's claims and attempted to provide appropriate work after plaintiff was injured." (App. I-26).

In the seawoman's request that the Court reconsider the legal standard the District Court later held that the statement,

"paragraph 17 is not incorrect as a matter of law." (App. G-6). The District Court again refused the request for attorneys fees stating:

> "The Court finds that attorneys' fees are not appropriate in this action as plaintiff has failed to provide evidence of any wilful or persistent behavior that would warrant attorneys' fees." (App. G-7).

At what point does the shipowner's refusal to pay the maintenance become wilful or a persistent behavior?

Punitive damages are not available as a matter of law in maintenance and cure cases in Hawaii since La Voie v. Kualoa Ranch and Activity Club, Inc., 797 F. Supp. 827 (D. Haw. 1992). Citing, Miles v. Apex Marine Corp., 498 U.S. 19, 111 S. Ct. 317 (1990). District Court Judge David Ezra found that the prospect of an award of attorney's fees was to act as a deterrent to the refusal to pay maintenance and cure. The possibility of punitive damages is no longer an incentive for ship owners to promptly pay maintenance.

The Ninth Circuit in Glynn v. Roy Al Boat Management Corp., 57 F. 3d 1495 (9th Cir. 1995), cert denied, 516 U.S. 10456 (1996) upheld the attorney's fees remedy for the work required to obtain maintenance and cure for the seaman but it did not address the payment of the cost of the treating doctor's expert medical testimony costs. In Glynn, the trial Judge awarded me $7,000 in fees reasoning that it matched what was owed in outstanding cure. The Ninth Circuit did not address the amount of attorney's fees leaving it up to the District Judges discretion.

In the instant case Plaintiff Helffrich received an award of maintenance of 403 days at $35 per day for a total gross award of $14,105. After the payment of attorney's fees and costs, the net

award to the injured seawoman amounted to $.73 per day. The net award, I believe, is an all time low in the administration of the remedy this last century. The injured seawoman was required to pay the cost of the medical expert witness fee of her treating doctor.

Had the seawoman not been required to pay attorney's fees and costs, the award of $35 per day would have been reasonable, and in keeping with the amounts of maintenance normally paid in the district of Hawaii. Therefore, this Court should review the policy of choosing to permit the offsetting of expert medical witness fees in cases of admiralty where injured seawomen are at the mercy of ship owners who choose not to pay maintenance at the earliest practical time or date.

This case is sui generius. My research indicates that it is the first time an injured seawoman who has prevailed in their admiralty court action has asked this court to grant her reimbursement of medical witness fees based upon the contractual obligation of maintenance and cure so that she is not obliged to take the money from her modest recovery.

To force her to pay in ignominious fashion and to accept $.73 a day, is not merely a pittance, it is a disgrace and a shame on the administrators of this judicially concocted workers' compensation system for seapersons.

This Court in West Virginia University Hospital, Inc v. Casey 499 U.S 83,111 S.Ct. 1138(1999), has ruled that expert medical fees may not be shifted to a prevailing party unless allowed by statute or contractual provision. This matter is uniquely different and requires the application of the contractual exception to this rule because of the quasi contractual nature of the shipowner's relationship to the seaman under the common law doctrine of maintenance and cure. This Court should grant certiorari to determine if the maintenance and cure contract of the general

maritime law includes attorney's fees and costs to obtain the remedy under 28 U.S.C. §§ 1821 (b) or 1920.

In West Virginia v. Casey a major hospital was seeking over $100,000 in fees attributable to expert services and testimony. Hospitals such as West Virginia Hospital usually have many sources of revenues, and therefore, this Court in its wisdom decided not to grant the request for the payment of expert witness testimony fees as there was no Statute or contract.

The financial nature and vested interests of the parties are substantially different. These differences should be taken into consideration in fashioning laws for seaman plaintiffs who have little incentive relative to the task and seldom the financial or other ability to bring the necessary action.

We need not claim that Plaintiff Helffrich and her Proctor are acting on behalf of all financially unendowed seawoman who otherwise are not able to sue to obtain the necessary care and maintenance support granted to them under the federal common law. She is carrying out the time-honored tradition of enforcing her contract not serving as a "private attorneys general" in bringing this action. She wants the $35 per day the Court awarded her.

There is a need for a healthy and non-punitive message to the shipping industry to pay reasonable maintenance and cure or face the compensatory costs to the injured seamen by having to pay for the costs including expert medical testimony for the seawoman's treating doctor which is a necessary component of proof in a maintenance and cure case. Had the shipowner paid the maintenance and cure, they would have avoided the necessity of having the medical expert testimony presented to the Court in the first place.

Most of my clients come into my office because they are injured and the shipowner will not help them get the medical care they need. To deny the injured seawoman a means for redress by

creating an economic market in which attorneys cannot afford to represent them or take their cases to court is somewhat insidious. Hidle v. Geneva County Board of Education, 681 F. Supp. 752, 758-759 (M.D. Ala. 1988). It is insidious to deny seawomen with valid cases the opportunity to go to court and to saddle them with the obligations to pay medical witness costs which are necessary to prove their claim for maintenance and cure.

This places upon impoverished seawomen a significant burden. Should they shrug their shoulders and walk away from the courthouse doors even though they have a completely meritorious case?. We ask the court to find within the contract of maintenance and cure a term that requires the shipowner to pay the costs necessary to meet their burden of proof in court if the shipowner ignores their duty.

Maintenance and cure is entirely judge-created law, a product of the common law. Because seamen are exempted from the state and federal workers' compensation statutes, they have no redress in another forum. There is no statutory prohibition against either damages or the award of reasonable fees and costs to obtain maintenance and cure. It is part of every Courts duty to keep their doors open to hear meritorious claims. Congress has remained silent in the area on maintenance and cure because the courts have fashioned this law.

The maritime legal history is intertwined with the development of railroad workers' laws, The Regional Rail Organization Act of 1973, 45 U.S.C. §§ 726 (f)(9) and the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. § 854 (g) both award reasonable fees of lawyers and experts.

In Crawfort Fitting Company v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed. 2d 385 (1987), the defendants prevailed in an antitrust case and sought the award of expert

witness fees in the amount of $86,480.70. The Court denied the request because of a statute which did not permit the payment of such fees.

It was an inappropriate attempt by a corporate defendant to use fee shifting as further punishment against the plaintiff who tried and failed in their cause of action. We are asking the Court to recognize the need to aid the injured seawomen who would otherwise be required to pay consequential costs out of their meager recovery at $35 per day. In Crawford, *infra*, the Court wouldn't use fee shifting to keep future meritorious claims from the Courthouse because it would have been punitive to both lose and be saddled with the costs.

Fee shifting is allowed when a claim is found to be frivolous under F.R.C.P. Rule 11 or similar statutes. We are asking the Court to view this case in terms of economic power and case sustainability and its effect on the ancient admiralty common law quasi contractual doctrine of maintenance and cure.

While the amount of dollars here may seem small to the large multi national corporate shipowners, it is large to Mie Helffrich who sought maintenance by going into a Federal Court during the time in which she was entitled to receive it. (App. I-6). The decision of the District Court not to permit the reasonable payment of necessary expert medical testimony by her treating doctor or to award attorney's fees resulted in a puric victory in that only the net amount of $.73 per day was finally obtained for the injured seawoman. When you figure in the post judgment garnishment work, the Circuit Court of Appeals work and this effort to obtain certiorari, seawoman Helffrich owes thousands for her successful efforts to obtain this remedy. The shipowner only paid the maintenance after garnishing the bank account of the corporate shipowner and filing the judgment against the vessel owner in the State of Hawaii Land Court. (App. D-1). What is the threshold of recalcitrance?

Justice Rehnquist determined in his compassion that wealthy defendants may not burden unsuccessful plaintiffs with expert witness fees as part of the costs awarded at the end of trial. Crawford, *supra*, makes complete sense in terms of economic power in that it would be inappropriate for the corporate defendant to saddle the individual plaintiff with expert witness fees. The decision maintained a level playing field on which litigants could fairly vie for the victory of their claims.

This Court has occasionally taken an interest in the issue of poverty and the resources of its litigants such as in Gideon v. Wainwright, 372 U.S. 335 (1963), where the right to counsel was guaranteed the impoverished client when charged with the commission of a crime.

Public interest litigation under existing congressional statutes, aimed to correct social wrongs, occasionally award attorney's fees and costs. This sui generius case does not interfere "in the legislative providence by redistributing litigation costs . . .", Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed. 2d 141 (1975). If private seawomen who has little or no money are to be able to assert their general maritime law rights and if shipowners who violate the nations fundamental maritime laws are not to proceed with impunity, these seapersons must have the opportunity to recover what it costs them to vindicate these rights in federal court. The Constitution charges the Court with this responsibility. U.S. Const. Art. III § 2.

Congress has already shown in statutes that expressly authorize the recovery of expert witness fees as part of the recovery of costs that it is within the realm of reasonable to award these fees and costs in some limited, well-defined areas. The admiralty common law of the United States is not limited by these statutes. Rather, under Miles v. Appex, 111 U.S. 317 (1990), the common law may allow these fees and costs to be granted when appropriate within the sound discretion of the district court if this Court grants

certiorari and finds the maritime law of the United States to be such that the seawoman can actually receive the $35 of maintenance.

The question is whether in the absence of a statutory authority, congress intended to authorize such recovery or whether this Court should authorize recovery given in the quasi contractual nature of maintenance and cure. Congress has acted to preserve for the judiciary the fabrication and administration of maintenance and cure. Exempting seamen from all other workers' compensation acts was an affirmative act entirely delegating authority in this area to the Supreme Court. The heath and welfare of these seamen is only the responsibility of the Supreme Court.

Maintenance and cure was entirely fabricated into the common law of the United States by judicial decision. Many specific aspects of maintenance and cure have been read into the "quasi-contract" which is implied in the relationship between vessel owners and their seamen. The development of the common law in this field would favor the notion that Mie Helffrich was supposed to receive the full $35 per day while she was in treatment, and would find within the contract a provision to pay these costs to the successful seawoman in her pursuit of maintenance and cure.

Certainly maintenance and cure was established as a remedy to make injured seamen whole. To enforce their rights seamen must be able to hire doctors first as treating physicians, payable under the concept of cure, and then, as expert medical testimony witnesses when they are needed to enforce the right to maintenance and cure.

You cannot win a case for maintenance and cure without a doctor testifying. Forty dollars a day for expert medical testimony is a hopelessly inadequate sum. The dilemma is do we cheat the doctor who healed the seawoman, or punish the seawoman for not picking a more compassionate shipowner or do we appropriately give the discretion to the District Court to place the burden where it belongs on the party that required the proof.

Not only will the proctor in admiralty not be willing to take a case for maintenance and cure, but the doctor once burned by having to testify to obtain payment of his medical bills will in the future, turn the seawoman away from his office rather than to get involved in the protracted litigation necessary to obtain the treatment and proper payment for maintenance and cure. To forbid the shifting of the expert's fee would encourage under-specialization and inefficient trial preparation.

Plaintiff Helffrich had the doctor testify very briefly on direct. He was scheduled to be away from his office for a maximum of two hours. The doctor's cross examination by the Defendants took up nearly the entire morning, and then, even after the outrage of the District Judge, the Defendants required the doctor to come back in and spend the rest of the day testifying. His cross examine, by the Defendants, went past the lunch break and through most of remainder of the day until 4:15 p.m., requiring the doctor to cancel his scheduled appointments for the entire day.

There is also a due process question in that how can you possibly get an award for maintenance and cure without the testimony of the treating physician. The record does not reflect the exact time of testimony on direct, the vire doir and examination is contained in approximately 20 pages of transcript. When the Court decided to break for lunch, Plaintiff's counsel informed the Court and opposing counsel that the doctor had only been scheduled to be in Court to testify until 12:00 or 12:30 p.m. The doctor informed the Court that to continue into the afternoon that he would have to cancel many patients, and defense counsel asked the Court to " if you give me one minute, I'll just finish now", then the defense counsel withdrew the offer to finish the doctor in a minute-and-a-half and the Court objected saying "I don't want to bring the doctor back if you are going to get up and do one minute an hour and a half from now Ms. Nelson." Plaintiff's counsel agreed not to ask any further questions of the doctor if the doctor could be finished before lunch. The Court made this clear to defense counsel and defense counsel stated "I would rather wait until after lunch. I have

an extensive outline of the summary of questions for the treating physician's expert testimony. He is their only medical witness in this case which is dealing directly with medical issues, and I don't think that I should be forced into one minute of cross examination. That's not what I intend to do after lunch."

There is an agreement between the Hawaii State Bar Association and the Hawaii Medical Association making it improper to subpoena a doctor without paying him the reasonable charges he requests for his medical testimony. These agreements probably exist in most states.

E. THERE IS A SPLIT IN THE CIRCUITS ON THE STANDARD TO APPLY IN AWARDING ATTORNEY'S FEES TO OBTAIN MAINTENANCE AND CURE.

The shipowner may not pay maintenance or cure and expect to be relieved of their duty to pay both. If the seawoman must seek counsel in order to recover that which is rightfully hers, the seawoman finds herself in the anomalous position of paying out-of-pocket for the recovery of her maintenance. The shipowner, knowing that only the actual amount of maintenance and cure will be awarded upon the disposition of a legal action is encouraged to arbitrarily withhold maintenance and cure at any time, forcing the seaman to seek counsel, or worse, to settle all their claims including Jones Act and unseaworthiness just to get basic medical care and support.

If the shipowner loses at court, the shipowner must only pay the original maintenance and cure sum unless they are found to be wilful, callous, and recalcitrant. The shipowner loses nothing by the delay in paying maintenance because there is little chance of compensatory damages from the courts. This was the anomalous situation which the Supreme Court addressed in

Vaughan v. Atkinson, 369 U.S. 527, 532, (1962). The employer has a duty to promptly investigate any claim and should resolve doubts in favor of paying the seamen what they are due.

The employer will not be faulted, however, if it acts in good faith to pay the seamen the legal minimum. Harper v. Zapata Off-Shore Co., 741 F.2d 87 (5th Cir. 1984). The vessel owners now investigate the claims and with a white heart and empty head just don't pay the remedy.

The standard for paying a seawoman's attorney fees in a maintenance and cure case in the Ninth Circuit was stated in Kopczynski v. The Jacqueline, etc., et al., 742 F.2d 555 (9th Cir. 1984), to be the reasonableness on the part of the shipowner. If a shipowner was unreasonable in withholding maintenance and cure, the shipowner "may" become liable for attorneys' fees arising out of the seawoman's need to legally pursue what is rightfully owed to her.

The Fifth Circuit en banc in Guevarra v. Maritime Overseas Corp., 59 F.3d 1496 (5th Cir. 1996), rejected the claim that the employers' failure to provide medical treatment or maintenance even if willful, persistent or callous, could permit an award in punitive damages and held that at best, the recovery could be for attorneys' fees under the provisions of Vaughan. The result was indicated by Miles v. Apex Marine Corp., 111 S.Ct. 317 (1990).

In the Second Circuit, the standard is the white heart and empty head test. In Roberts v. S.S. Argentina, et al., 359 F.2d 430 (2nd Cir. 1966) attorneys' fees will be denied where the defendant acts in good faith. The Second Circuit looks for honest disagreements about entitlement. Bailey v. Moore-McCormack Lines, Inc., 280 F.Supp. 310 (N.Y. 1967), or "sufficient callousness", Gajewski v. United States, 540 F.Supp. 381, 1982 A.M.C. 2830 (D.C. N.Y. 1982); McMillan v. Tug Jane A. Bouchard, etc., et al., 885 F. Supp. 452 (N.Y. 1995), was the shipowner in "good faith" investigating. Vaughan v. Atkinson,

supra, focused on the failure to provide maintenance and cure. It is just not clear when the seawoman's lawyer should bet an award of fees.

The shipowner willingly and knowingly paid cure directly to the seawoman's medical providers. However, they refused to pay and had not paid maintenance to the seawoman until she garnished their bank account and incurred further costs and legal fees. The shipowner never hired a doctor to state Helffrich was fit for duty nor did they depose the treating doctor. The shipowner also could have come to Court for a declaratory judgment action to terminate the seawoman's maintenance which would require the shipowner to put on expert medical testimony. Instead, the shipowner paid to have surveillance video tapes made of seawoman through her second story window and films of her taking out her garbage and walking her dog which the shipowner offered as proof that she was not entitled to maintenance because she could have performed the alternative non-seawoman job if they had not fired her. Firing her terminated the state mandated healthcare which was part of her employment. With COBRA, Helffrich could have paid for continued health coverage if she wasn't injured and unemployed.

CONCLUSION

For the foregoing reasons we respectfully request that this Court grants this Petition for Writ of Certiorari.

Respectfully submitted,

JAY LAWRENCE FRIEDHEIM
Admiralty Advocates
820 Mililani Street, Suite 503
Honolulu, Hawaii 96813
Telephone: (808) 545-5454

JOHN R. REMIS, JR.
547 Halekauwila Street, Suite 118
Honolulu, Hawaii 96813
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 3, 2000 three true and complete copies of Petitioner's Petition for Writ of Certiorari in the above-captioned matter, were duly served upon the following parties to their last known addresses through the United States Post Office, first-class postage prepaid:

Michelle Nelson
Lesser & Associates
733 Bishop St., 2400 Makai Tower
Honolulu, HI 96813
Attorney for Defendants-Appellees

DATED: Honolulu, Hawaii, April 3, 2000.

/s/ JAY LAWRENCE FRIEDHEIM
JOHN R. REMIS, JR.
Attorneys for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MIE MAKITA HELFFRICH,	)	(Filed 1/24/00)
	)	
Plaintiff- Appellant	)	CA NO. 98-16611
	)	
vs.	)	ORDER
	)	
ATLANTIS SUBMARINES, INC.; ATLANTIS SUBMARINES HAWAII, INC.; ATLANTIS SUBMARINES HAWAII, LP; JOHN DOES, 1-20; JANE DOES 1-20; DOES PARTNERSHIPS 1-20; DOES GOVERNMENTAL AGENCIES 1-20; OTHER ENTITLES 1-20, In Personam ; M/V "DOE VESSELS I-X", In Rem	)	
	)	
Defendants- Appellees	)	
	)	

Before: BROWNING, RYMER and KLEINFELD, Circuit Judges

Each party is to bear its own costs and attorneys' fees on appeal.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MIE MAKITA HELFFRICH,	)	No. 98-16611
	)	D.C. No. CV-96-00714
Plaintiff- Appellant,	)	HG/BMK
	)	
v.	)	(Filed 1/4/00)
	)	
ATLANTIS SUBMARINES, INC,; ATLANTIS SUBMARINES HAWAII, INC.; ATLANTIS SUBMARINES HAWAII LP, JOHN DOES 1-20; JANE DOES1-20; DOE PARTNER-SHIPS 1-20; DOE CORPORATION 1-20;DOE ASSOCIATES 1-20; DOE GOVERNMENTAL AGENCIES1-20; OTHER ENTITLES 1-20, In Personam; M/V " DOE VESSEL I-X:, In Rem,	)	MEMORANDUM[1]
Defendants- Appellees.	)	

Appeal from the United States District Court
for the District of Hawaii
Helen Gillmor, District Judge, Presiding

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1 This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Submitted December 9, 1999 [2]
San Francisco, California

Before: BROWNING, RYMER, and KLEINFELD, Circuit Judges

The district properly refused to award Helffrich attorney's fees. Attorney's fees are properly awarded only "where the shipowner has been willful and persistent in its failure to investigate a seaman's claim for maintenance and cure or to pay maintenance." Glynn v. Roy Al Boat Mgt. Corp., 57 F.3d 1495, 1505 (9th Cir. 1995). The district court did not err in finding that Atlantis did not willfully and persistently fail to investigate or to pay Helffreich's maintenance and cure claim. On the contrary, Atlantis investigated Helffrich's claim of injury, kept in contact with her doctor and attempted to accommodate Helffrich by provided light duty work.

The district court also correctly ruled that it had no authority to award costs for witnesses beyond that prescribed in 28 U.S.C. § 1920 and 28 U.S.C. § 1821(b). Under Crawford Fitting Co. v. J.T. Gibbons, Inc., it is well established that "absent explicit

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2 The panel finds this case appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a)(2).

statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." 482 U.S. 437, 445, (1987); see also Aceves v. Allstate Ins. Co., 68 F.3d 1160, 1167 (9th Cir. 1995) (citing Crawford Fitting for the holding that a federal court may not exceed the statutory limit for witness costs set out in § 1821, and "may not use other cost provisions like 28 U.S.C. § 1920 or Federal Rule of Civil Procedure 54(d) to circumvent section 1821(b)").

It is settled that , "[i]n admiralty, prejudgment interest must be granted unless peculiar circumstances justify its denial." Vance v. American Hawaii Cruises, Inc., 789 F.2d 790, 795 (9tyh Cir. 1986) (citation and international quotation marks omitted). The district court apparently overlooked Helffrich's request for prejudgment interest in her Complaint and Proposed Findings of Fact and Conclusions of Law. We remand to the district court to determine whether peculiar circumstances justify the denial of prejudgment interest.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Richard A. Lesser #5832
LESSER & ASSOCIATES
A Professional Law Corporation
1 Pearl Street
Redondo Beach, California 90277
Telephone: (310) 374-4808
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MIE MAKITA HELFFRICH,	)	CIVIL NO. 96-00714 HG
	)	
Plaintiff,	)	SATISFACTION OF JUDGMENT
	)	
vs.	)	
	)	(Filed 3/6/99)
ATLANTIS SUBMARINES, INC.; ATLANTIS SUBMARINES HAWAII, L.P.; JOHN DOES 1-20; JANE DOES 1-20; DOE PARTNERSHIPS 1-20; DOE CORPORATIONS 1-20; DOE GOVERNMENTAL AGENCIES 1-20; AND OTHER ENTITIES 1-20; In Personam and "DOE VESSELS I-X" In Rem,	)	
	)	
Defendants.	)	
	)	

SATISFACTION OF JUDGEMENT

Plaintiff MIE MAKITA HELFFRICH by and through her

counsel undersigned, hereby acknowledges receipt of $14, 505.14 in full satisfaction of the judgement entered herein on June 11, 1998 in favor of Plaintiff MIE MAKITA HELFFRICH and against all parties. The clerk of the court is requested to indicate in the court records that said Judgement is paid in whole and is satisfied in whole.

DATED: Honolulu, Hawaii, March 6, 1999.

/s/ JOHN REMIS
Attorney for Plaintiff

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MIE MAKITA HELFRICH,

Plaintiff,

v.

ATLANTIS SUBMARINES HAWAII L.P.

CIVIL NO. 96-00714 HG
UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF HAWAII

CASE: MIE MAKITA HELFFRICH,
vs. ALLANTIS SUBMARINES HAWAII LP;
CIVIL NO. 96-00714 HG (In Admiralty)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MIE MAKITA HELFFRICH,	)	CIVIL NO. 96-00714 HG
	)	
	)	(Filed 11/10/98)
	)	
Plaintiff,	)	ORDER ADOPTING
	)	REPORT OF SPECIAL
	)	MASTER ON DEFENDANTS'
vs.	)	OPPOSITION TO
	)	PLAINTIFF'S AMENDED
ATLANTIS SUBMARINES, INC.; et al.	)	BILL OF COSTS AND
	)	MOTION TO STRIKE
	)	
Defendants.	)	
	)	

ORDER ADOPTING REPORT OF SPECIAL MASTER ON DEFENDANTS' OPPOSITION TO PLAINTIFF'S AMENDED BILL OF COSTS AND MOTION TO STRIKE

INTRODUCTION

The special Master filed his Report of Special Master on Defendants Opposition to plaintiff's Amended Bill of Costs and Motion to strike on October 2, 1998 ("Report"). In the Report, the Magistrate Judge calculated the allowable attorneys' fees and costs according to 28 U. S. C . § 1920. The Report provided, in

particular, that Plaintiff Mie Makita Helffrich ("Plaintiff") be compensated for the testimony of Dr. Bernard Portner at the statutory rate of forty dollars.

In response to the Report, Plaintiff filed Plaintiff's motion to Contest Report of Special Master on Defendant's Opposition to Plaintiff's Amended Bill of Costs and Motion to strike on October 13, 1998. Essentially, Plaintiff objects to the portion of the Report recommending that Dr. Portner be paid the statutory witness fee. Instead, Plaintiff argues that the full cost of Dr. Portner's expert medical testimony be paid by the defendants.

The Court finds Plaintiff's argument unpersuasive. Accordingly, the Report is ADOPTED by the Court.

ANALYSIS

Under Fed. R. Civ. P. 54 (d) courts do not have discretion to tax costs. Courts are limited to taxing the costs that are delineated in 28 U. S. C. § 1920. Crawford Fitting Company v. J T. Gibbons, Inc. Champion International corporation, 482 U.S. 437,445 (1981). Among the costs permitted are fees and

disbursements for witnesses and compensation for court appointed experts. 28 U.S.C. § 1920 (3), (6). Witness fees are taxed at the statutory rate under 28 U.S.C. § 1821 (B), which is currently forty dollars ($40.00) a day. If a witness is a court appointed expert, however, a court may depart from the standard witness rate and pay for the witness fees incurred for a witness who is appearing at the behest of the court. See 28 U.S.C. § 1920 (6). The Supreme Court unequivocally holds that " absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." Crawford Fitting Company, 482 U . S at 445.

In the present case, Plaintiff requests that the court modify the Report and award Dr. Portner $4402.95 for appearing in court. Plaintiff appears to be making a equitable argument to the effect that Dr. Portner should be considered a court appointed expert because the Court relied on his opinion, because he was the only medical practitioner to appear as a witness, and because Plaintiff cannot afford to pay Dr. Portner's fees out of the award

she received.

The Court does not find Plaintiff's argument persuasive. Significantly, the court notes that Dr. Portner was not a court appointed expert, and appeared for Plaintiff at her request. Accordingly, the Court does not have discretion to tax Dr. Portner's full costs as an expert. The Report of the Special Master is ADOPTED.

CONCLUSION

In accordance with the foregoing, the Court ADOPTS the Report of the Special Master.

IT IS SO ORDERED .

DATE: Honolulu, Hawaii, November10 ,1998

/s/ HELEN GILLMOR
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MIE MAKITA HELFFRICH, Plaintiff,	)	CIVIL NO. 96-00714 HG (In Admiralty)
vs.	)	
	)	(Filed 10/2/98)
ATLANTIS SUBMARINES, INC.; et al.,	)	
Defendants.	)	
	)	

REPORT OF SPECIAL MASTER ON DEFENDANT'S OPPOSITION TO PLAINTIFF'S AMENDED BILL OF COSTS AND MOTION TO STRIKE

Before the court is Defendant Atlantis Submarines, Inc., Atlantis Submarines Hawaii LP's ("Defendant") Opposition to Plaintiff's Amended Bill of Costs; Motion to Strike ("Motion"). By this Motion, Defendant seeks court review of the Clerk of Court's taxation of costs requested in Plaintiff Mie Makita Helffrich's ("Plaintiff") Amended Bill of Costs. After careful consideration of the Motion and supporting and opposing memoranda, the court RECOMMENDS that Defendant's Motion be GRANTED in part and DENIED in part and that Plaintiff be awarded costs in the amount of $1,713.44.

BACKGROUND

Plaintiff sustained injuries to her right shoulder and neck during the course of employment as a seaman for Defendants. Subsequently, while undergoing treatment for these injuries, Plaintiff was fired by Defendants, allegedly for failure to timely obtain an Employment Authorization Card from the Naturalization Service. In her complaint Plaintiff asserted allegations of negligence against Defendants for personal injuries under the Jones Act and asserted causes of action against the Defendants as vessel owners under general maritime law for unseaworthiness and maintenance and cure. In addition to these maritime claims, Plaintiff asserted claims for breach of an oral employment contract, wrongful discharge, and intentional and negligent infliction of mental distress. Following a bench trial, District Judge Helen Gillmor found Defendants liable only for maintenance and cure. See Findings of Fact and Conclusions of Law and Order filed on June 3, 1998. She directed Defendants to pay $14,070.00 for past and

future maintenance and to make cure payments directly to Plaintiff s doctor for his treatment of Plaintiff s neck and shoulder. Id. On June 30, 1998, Plaintiff filed an Amended Bill of Costs in the amount of $6,791.68. On July 6, 1998, the Clerk of Court taxed the requested $6,791.68. Defendants filed the instant motion challenging Plaintiff s entitlement to the taxed costs on July 14,1998.[1]

DISCUSSION

Rule 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d); see Trans Container Services (Basel) A.G. Security Forwarders, Inc., 752 F.2d 483, 488 (9th Cir. 1985). The Supreme Court has held that courts do not have discretion under

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1 Rule 54(d)(1) provides that "[o]n motion served within 5 days [after costs are taxed by the clerk], the action of the clerk may be reviewed by the court." Defendants filed the instant motion six days after the clerk taxed Plaintiff's costs. Because the practice of this court is to serve rulings on the parties by mail, this court presumes that Defendants did not receive notice of the clerk's taxation of costs until at least one and maybe two days after actual taxation. For this reason and because Plaintiff has not opposed the instant Motion as untimely, the court finds Defendant's failure to meet the deadline to be excusable and not adverse to this court's consideration of the Motion on its merits.

Fed. R. Civ. P. 54(d) to tax whatever costs seem appropriate. Rather, courts may tax only those costs defined in 28 U.S.C. § 1920. See Alflex Corp. v. Underwriters Labs, Inc., 914 F.2d 175 (9th Cir. 1990) (citing Crawford Fitting CO. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-442 (1987)). Section 1920 permits a federal judge to tax as costs the following:

> (1) Fees of the clerk and marshal;
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of the title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920.

Plaintiff sought taxation of $6,791.68 in costs, itemized as follows:

1. Sheriff - service of process	$16.75
2. Court reporter fees	
a. Straub Hospital	52.60
b. Queen's Medical Center	63.85
c. Gaye Gunter and Paul Dyson	303.07
d. Joyce Wong	114.01

e. Jeri Mullin	102.13
f. Carnazzo/Pacific Rehab	158.68
g. Shinichi Louis	186.37
h. Yukie Ichikawa	180.96
3. Deposition Fees/Expert Witness Fees	
a. Gaye Gunter deposition fee	40.00
b. Shinichi Louis deposition fee	40.00
c. Dr. Portner prepayment fee	550.37
d. Dr. Portner, trial testimony	3,852.58
4. Airfare and car expenses	181.07
5. Copies	
a. Records of Dr. Portner	11.75
b. Records of Dr. Smith	38.02
7. Miscellaneous	
a. Exhibit photos	51.28
b. Copies of hatch schematic	29.69
c. Copies of trial exhibits	100.00
d. Copies: 4/97-conference	60.10
e. Copies: conference-judgment	444.20
TOTAL	$6,791.68[2]

The Clerk of Court taxed the requested $6,791.68. The instant Motion followed. Thereafter, Plaintiff submitted a revised itemization of her copying costs. See Exhibit "A" attached to Plaintiff s Declaration of Jay Lawrence Friedheim. Pursuant to

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2 The court notes that Plaintiff's itemized costs do not total $6,791.68. Rather, by the court's calculation, the itemized costs total $6,577.48. The discrepancy is immaterial as the court will review the itemized costs without regard to the total amount taxed.

Exhibit "A", Plaintiff seeks copying costs of $544.70 for 5,447 photocopies at $. 10 per page. The court understands that the copying costs itemized in Exhibit "A" include those copying and miscellaneous costs previously listed in the Amended Bill of Costs.[3]

A. Sheriff s Fees

Plaintiffs request for sheriffs fees of $16.75 for service of process is permissible pursuant to 28 U.S.C. § 1920(l).

B. Court Reporter Fees

Plaintiff seeks court reporter fees in the amount of $1,161.67. Of this total, $180.96 is for a trial transcript from Yukie Ichikawa, the court reporter, and $980.71 is for deposition transcripts.

Under 28 U.S.C. § 1920(2), the court has the power to tax trial transcripts that were "necessarily obtained for use in the case." Independent Iron Works, Inc. v. U.S. Steel Corp., 322 F.2d 656,678 (9th Cir. 1963). Unless the trial transcripts were ordered by the court, the prevailing party must prove they were reasonably

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3 The only miscellaneous cost not included in the latest itemization is the requested $51.28 for exhibit photos. The court will discuss this item separately from photocopies.

necessary for use in the case and not merely for the convenience of counsel. Id. The court did not order trial transcripts in this case and Plaintiff makes no showing that such transcripts were reasonably necessary. The instant case involved issues that were, not so complex that trial transcripts are justified, particularly where counsel had both deposition transcripts and co-counsel present to take notes. Accordingly, Plaintiff is not entitled to reimbursement of $180.96 for trial transcripts.

Plaintiff requests court reporter fees for the depositions of Joyce Wong, Jeri Mullins, Gaye Gunter, Paul Dyson, and Shinichi Louis. Fees incurred obtaining deposition transcripts may also be recovered under 28 U.S.C. § 1920(2). See Association of Flight attendants v. Horizon Air Indus. Inc., 976 F.2d 541, 551 (9th Cir. 1992). Such costs are recoverable only if necessarily obtained for use in the case. See Alflex, 914 F.2d at 177-78. A review of the court file shows that portions of the depositions taken of some of these witnesses and/or live testimony from the remaining witnesses were presented at trial. Additionally, the court notes that Joyce Wong and Jeri Mullins were both included in Defendant's final

Witness List and their depositions were thus reasonably necessary to enable Plaintiff to prepare for cross-examination. Accordingly, the court finds that deposition transcripts of these witnesses were necessarily obtained for use in the case.

Additionally, Plaintiff requests court reporter fees for deposition preparation fees and/or the record depositions of Straub Clinic and Hospital, The Queen's Medical Center, and Pacific Rehabilitation Hospital. The court finds that these depositions were reasonably necessary in light of the personal injury aspects of this case. Furthermore, Defendant offered no specific objections to the requested court reporter fees for depositions. Accordingly, Plaintiff is entitled to 5 the requested $980.71.

C. Deposition Fees/Expert Witness Fees

Plaintiff seeks witness fees of $4,402.95 for Dr. Portner, and $40.00 each for Gaye Gunter and Shinichi Louis. Section 1920(3) permits taxation of costs for "[flees and disbursements for ... witnesses." The Supreme Court has made it clear that unless the expert is court appointed, witness fees shall be taxed at the statutory rate pursuant to 2 8 U. S. C. § 182 1 (b), now $40.00 per

day. Crawford Fitting v. IT. Gibbons, Inc., 107 S. Ct. 2492 (1987). "A federal court may not exceed this limit without explicit statutory or contractual authorization." Aceves v. Allstate Insurance Company, 68 F.3dl 10, 1166 (9th Cir. 1995). Section 1821 (a)(1) authorizes witness fees for those witnesses "in attendance at any court of the United States, ... or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States[.]"

Dr. Portner was not court appointed and therefore, Plaintiff may recover only the statutory $40.00 per day for his testimony. The requested $40.00 each for the deposition testimony of both Gaye Gunter and Shinichi Louis is permissible. Plaintiff does not indicate that any of these three witnesses testified more than one day.

D. Deposition Airfare and Car Expenses

Witnesses are also entitled to subsistence fees and airfare expenses under 28 U.S.C. §1821(d). Pursuant to 28 U.S.C. § 1821(c)(1), claims for airfare expenses must be "at the most economical rate reasonably available." Claims must be accompanied

by "[a] receipt or other evidence of actual cost." 28 U.S.C. § 1821(c)(1). A bill of costs for subsistence and travel expenses pursuant to § 1920 must comport with the requirements of 28 U.S.C. § 1924, which 6 states:

> Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.

Thus, claims for airfare and rental car expenses must be supported by actual travel vouchers, receipts, affidavits, or other documentation.

In her Amended Bill of Costs Plaintiff merely requests $181.07 for witness deposition airfare and car expenses. No additional information about these expenses is provided. Due to her failure to provide appropriate documentation to support this request, Plaintiff is not entitled to any subsistence fees.

E. Copying Costs

Plaintiff seeks $544.70 for copying a total of 5,447 pages at

$.10 per page. Section 1920(4) permits taxation for the copies of papers "necessarily obtained for use in the case" and does not require that the document be introduced into the record. Haagen-Dazs Company, Inc. v. Double Rainbow Gourmet Ice Cream, Inc., 920 F.2d 587, 588 (91h Cir. 1990). Copying costs are generally not recoverable, however, when there is no showing of the nature of the documents copied. American Key Corp. v. Cumberland Assoc., 102 F.R.D. 496, 499 (N.D. Ga. 1984).

Plaintiff s most recent itemization properly discloses the nature of the documents,[4] the number of copies made and the corresponding cost per copy for each request. The court finds Plaintiffs requested copying to be both reasonable and necessarily obtained for use in the case. Therefore, Plaintiff is entitled to recover $544.70 in copying costs.

F. Exhibit Photos

"[C]osts of photographic materials used at trial are encompassed by" section 1920(4), which authorizes taxation of

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4 The court presumes that costs for copying trial preparation and exhibits includes those copying originally requested in her Amended Bill of Costs for hatch schematics and trial exhibits.

costs for "[flees for exemplification and copies of papers necessarily obtained for use in the case[.]" Maxwell v. Hapag-Lloyd Aktiengesellschaft, 862 F.2d 767, 770 (9th Cir. 1988). The phrase "exemplification and copies of papers" has been interpreted to include "all types of demonstrative evidence, including photographs and graphic aids[,] as well as illustrative materials if such materials were necessarily obtained for use in the case, as § 1920 requires. Id. at 770. Therefore, Plaintiff s request for reimbursement of costs for exhibit photos in the amount of $51.28 is permissible under 28 U.S.C. § 1920(4).

CONCLUSION

Based on the foregoing, the court finds that Plaintiff is entitled to taxation of the following costs:

Sheriff's Fee	16.75
Court Reporter Fees	
a) Straub Hospital	52.60
b) Queen's Medical Center	63.85
c) Gaye Gunter and Paul Dyson	303.07
d) Joyce Wong	114.01
e) Jeri Mullin	102.13
f) Carnazzo/Pacific Rehab.	158.68
g) Shinichi Louis	186.37
Deposition Fees/Expert Witness Fees	
a) Gaye Gunter	40.00

b) Shinichi Louis	40.00
c) Dr. Portner	40.00
Photocopies	544.70
Exhibit Photographs	51.28
TOTAL	$1,713.44

Accordingly, the court RECOMMENDS that Defendant's Motion be GRANTED in part and DENIED in part and that Plaintiff be awarded costs of $1,713.44.

IT IS SO FOUND AND RECOMMENDED.

Dated: Honolulu Hawaii October 2, 1998.

/s/ Barry M. Kurren
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MIE MAKITA HELFFRICH,	) Civ. No. 96-00714
	)
Plaintiff,	) (Filed 8/7/98)
	)
vs.	)
	)
ATLANTIS SUBMARINES, INC., et al.	)
	)
	)
Defendants.	)
	)

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED JUNE 3, 1998 AND ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION OF THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT ENTERED ON JUNE 11, 1998

INTRODUCTION

I. Summary

Plaintiff Mie Makita Helffrich ("Plaintiff") sued Defendants Atlantis Submarines, Inc., et al. ("Defendants" or "Atlantis") , for various causes of action related to an injury she sustained during her employment and to her termination from employment. Trial in

the action commenced on May 19, 1998. On June 3, 1998, the Court filed its Findings of Fact and Conclusions of Law and order (the "Order") . Both parties now move for reconsideration of the Order. The Court DENIES both motions for reconsideration

II. Procedural History

On June 3, 1998, the Court filed its Findings of Fact and Conclusions of Law and order. On June 11, 1998 the Clerk of the entered judgment in the case. On June 17, 1998, Plaintiff filed a Motion for Reconsideration of the Court's Findings of Fact and Conclusions of Law filed on June 3, 1998 ("Plaintiff's Motion for Reconsideration") . On June 29, 1998, Defendants filed an opposition to Plaintiff's Motion for Reconsideration. On July 2, 1998, Plaintiff filed a reply to Defendants, opposition.

On June 23, 1998,Defendants filed a motion for reconsideration ("First Motion for Reconsideration") Defendants subsequently filed on June 23, 1998, a Motion for Re nsideration of the Court's Findings of Fact and Conclusions of Law and Judgment Entered on June 11, 1998 ("Defendants' Motion for Reconsideration") which withdrew Defendants' First Motion for

Reconsideration. On July 2, 1998, Plaintiff filed an opposition to Defendants' Motion for Reconsideration. Defendants have not filed a reply.

STANDARD OF REVIEW

Both Plaintiff and Defendants have cited Federal Rule of Civil Procedure Rule 59(e) as authority for their motions. Rule 59(e) provides that:

> [a] ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."

A party seeking reconsideration of a decision of the Court under Rule 59(e) must satisfy two burdens. First, it must demonstrate some reason why the court should reconsider its prior decision. Second, it must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. All Hawaii Tours, Corp. v. Polynesian Cultural Center, 116 F.R.D. 645, 649 (D. Haw. 1987), rev'd on other grounds, 855 F.2d 860 (9th Cir. 1988). Motions under Rule 59(e) are granted upon three grounds: (1) if the district court is presented with newly discovered evidence; (2) if the district court committed clear error or the initial decision

was manifestly unjust, or (3) if there is an intervening change in controlling law. School Dist. No. 1J. , Multnomah County v. ACandS, Inc., 5 F.3d 12S5, 1263 (9th Cir. 1993), cert. denied, 512 U.S. 1236 (1994). A motion to amend or alter under Rule 59 (e) ". . .may not be used to relitigate old matters or to raise arguments or present evidence that could have been raised prior to entry of judgment." Demasse v. ITT Corp.,). , 915 Supp. 1040, 1048 (D. Ariz. 1995).

ANALYSIS

1. Plaintiff's Motion for Reconsideration

In Plaintiff Is Motion for Reconsideration, Plaintiff requests that the Court reconsider its denial of attorneys' fees to Plaintiff. Plaintiff states that the "result must be based upon a mistake of law[,] 11 and that the motion is brought in light of new evidence with respect to the legal costs of Plaintiff. (Plaintiff Is Motion for Reconsideration at 5-6.) Plaintiff also requests that the Court instruct the Clerk of the Court to remove the Entry of Judgment filed in this case so that the time for appeal does not begin to toll until after the resolution of the instant motion.

(Plaintiff's Motion for Reconsideration at 6.) In a section entitled "OBITER DICTUM," Plaintiff requests that the Court again order Defendants to turn over the surveillance tapes that were taken of Plaintiff separately.

A. Attorneys' Fees

As the Court stated in awarded attorneys, fees if award attorneys' fees and The Court will address each request its order, "[a] plaintiff may be the shipowner has been willful and persistent in its failure to investigate the plaintiff's claim or to pay maintenance." (Order at ¶16 of the Conclusions of Law.) Plaintiff acknowledges in her reply that "in order for the court to punitive damages there must be substantive evidence of arbitrary, callous, recalcitrant, willful or egregious conduct." (Plaintiff Mie Makita Helffrich's Reply to Defendants' Opposition to Plaintiff Is Motion for Reconsideration at 2.)

Plaintiff's motion for Reconsideration appears to be arguing that attorneys' fees are a matter of right. The caselaw, however, indicates that attorneys' fees are only appropriate in certain circumstances. In the present case, Defendants' actions were not so

willful and persistent in light of the facts that Defendants were faced with a violation of the immigration laws should Plaintiff not obtain valid work authorization, Defendants attempted to provide less strenuous work for Plaintiff, and Plaintiff did not contact Defendants regarding maintenance after her termination. (Order at ¶¶39, 24-29, 45-46 of the Findings of Fact.)

Plaintiff also alleges that paragraph 17 of the conclusions of law section of the Order ("Paragraph 17") is incorrect as a matter of law because it creates a new standard for awarding attorneys, fees. (Plaintiff Is Motion for Reconsideration at 4.) Paragraph 17 provides that " [i]n this case, attorneys, fees are not appropriate .4as Atlantis promptly investigated Plaintiff Is claims and attempted to provide appropriate work after Plaintiff was injured." Plaintiff, however takes Paragraph 17 out of context. Paragraph 17 of the conclusions of law section of the order discusses the legal standard for awarding attorneys' fees and the circumstances where they are appropriate. Following that discussion, Paragraph 17 concludes that attorneys, fees are not warranted in this case and gives examples of Defendants' actions that did not amount to the willful

or persistent behavior needed to award attorneys' fees. The Court finds that Paragraph 17 is not incorrect as a matter of law.

Plaintiff has failed to produce any new evidence and has failed to demonstrate a manifest error of law warranting a revisitation of this issue. The Court finds that attorneys, fees are not appropriate in this action as Plaintiff has failed to provide evidence of any willful or persistent behavior that would warrant attorneys' fees.

Plaintiff's Motion for Reconsideration with respect to attorneys' fees is DENIED.

B. Removal of the Entry of Judgment

Plaintiff requests that the Court direct the Clerk of the Court to remove the Entry of Judgment filed in this case on June 11, 1998, as the time to file an appeal will begin to toll from that date irrespective of the filing of the motion for reconsideration. Federal Rule of Appellate Procedure Rule 4 (a)(4) provides that "time for appeal of all parties runs from the entry of the order disposing of the last such motion outstanding." The rule then lists five motions to which this rule applies, one of which is to alter or

amend a judgment under Rule 59. Fed. R. App. P. 4 (a) (4) (C) under the plain wording of appellate rule 4(a)(4), the time for filing an appeal of this case will not toll until the order deciding the motions for reconsideration is filed. Accordingly, Plaintiff 's request is DENIED as moot.

C. Obiter Dictum

Plaintiff raises the concern that the surveillance tapes taken of Plaintiff have not been relinquished to her. The deputy clerk has been informed that the existing copies of the tape, with the exception of the tape in evidence, have been given to Plaintiff. Accordingly, this request is moot.

Also in this section, Plaintiff's counsel appears to misunderstand the Court's findings with respect to the credibility of the Plaintiff. At paragraph 36 of the findings of fact section of the order, the Court did not find Plaintiff's testimony believable with respect to the occurrence of a conversation between Plaintiff and George Ann Skandis. This finding was consistent with evidence relevant to Plaintiff Is credibility that arose during the trial: Jeri

Mullin testified that Plaintiff had a reputation for being untruthful during her employment at Atlantis (Order at ¶36 of the Findings of Fact.); Aimee Drewry's notes, entered as evidence, stated that she believed Plaintiff was secretive with respect to two different telephone conversations (Order at ¶¶23, 25 of the Findings of Fact); and Plaintiff testified that she lied. An injury to herself in the process of quitting a job and included that lie on her job application to Atlantis (Order at $36 of the Findings of Fact) . That evidence supported the Court's finding that Plaintiff's testimony was not believable with respect to an alleged promise by George Ann Skandis. This finding has no relationship to the issue that Plaintiff is counsel raises regarding the possession of the surveillance tapes.

II. Defendants' Motion for Reconsideration

In Defendants' Motion for Reconsideration, Defendants claim that maintenance should not have been awarded under maritime law. The Court held that the duty to pay maintenance extends until the point of maximum medical recovery, and that this duty must be followed irrespective of termination of employment. (Order at ¶¶8-9 of the Conclusions of Law.) In the present motion,

Defendants have not cited any persuasive or precedential cases which hold otherwise. The Court finds that there is no manifest error of law in holding that maintenance payments are to continue until the point of maximum medical recovery. With respect to Defendants' claims that Plaintiff had other employment during her injury, the Court finds Wood v. Diamond M Drilling Co. , 691 F. 2d 1165 (5th Cir. 1982), cert. denied, 460 U.S. 1069 (1983), persuasive. Plaintiff is entitled to maintenance even though she obtained other employment as there is no evidence that she received maintenance from another employer, she did not return to the trade she was engaged in when injured, and there is evidence that she had not recovered from her injury at the time of trial.

Defendants also state that the rate of maintenance applied by the Court exceeds the normal rate of maintenance in the Hawaiian community, and directs the Court to the testimony of George Ann Skandis. Defendants, however, again fail to rebut the testimony of Plaintiff that her own costs totaled $35 per day, and fail to cite any authority which holds that maintenance in the Hawaiian community is limited to $22 per day. The Court finds that

there was no manifest error of law for finding that the rate of maintenance to be paid to Plaintiff based on her unrebutted testimony is $35 per day.

Defendants' Motion for Reconsideration is DENIED.

CONCLUSION

In light of the considerations herein, the Court hereby ORDERS:

1) Plaintiff's Motion for Reconsideration is DENIED.

2) Defendants' Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, August 7, 1998.

/s/ HELEN GILLMOR
United States District Judge

Helffrich v. Atlantis Submarines, et al.; Order Denying Plaintiff f ' s Motion for Reconsideration of the Court's Findings of Fact and Conclusions of Law Filed June 3, 1998 and Order Denying Defendants Motion for Reconsideration of the Court's Findings of Fact and Conclusions of Law and Judgment Entered on June 11, 1998; Civil No. 96-00714 HG

UNITED STATES DISTRICT COURT

District of Hawaii

(Filed 6/11/98)

MIE MAKITA HELFFRICH

V.

ATLANTIS SUBMARINES, INC., et al.

JUDGMENT IN A CIVIL CASE

Case Number: Civil 96-00714 HG

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Judgment is entered pursuant to the "Findings of Fact and Conclusions of Law and Order" filed June 3, 1998.

cc: John R. Remis, Jr./Jay Lawrence Friedheim
Michele Nelson/Richard A. Lesser
David P. Ledger

June 11, 1998
Date

Walter A.Y.H. Chinn
Clerk

/s/
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MIE MAKITA HELFFRICH	)	CIV. NO. 96-00714 HG
	)	
Plaintiff,	)	(Filed 6/3/98)
	)	
vs.	)	
	)	
ATLANTIS SUBMARINES, INC.; ATLANTIS SUBMARINES HAWAII, INC.; ATLANTIS SUBMARINES HAWAII LP; JOHN DOES 1-20 JANE DOES 1-20; DOE PARTNERSHIP 1-20; DOE CORPORATIONS 1-20; DOE ASSOCIATIONS 1-20, DOE GOVERNMENTAL AGENCIES) 1-20, AND OTHER ENTITLES 1-20 In Personam and M/V "DOE VESSELS I-X" In Rem,	)	
	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

The Complaint of Plaintiff Mie Makita Helffrich, filed August 23, 1996, against Atlantis Submarines, Inc., Atlantis

Submarines Hawaii, Inc., and Atlantis Submarines Hawaii LP, et al., came for trial before the Court on May 19, 1998. John R. Remis, Jr., Esquire, and Jay Lawrence Friedheim, Esquire, appeared on behalf of Plaintiff. Michele Nelson, Esquire, appeared on behalf of Defendants. The Court, having considered the testimony, authority and evidence presented, issues the following findings of fact, conclusions of law and order. Any finding of fact that should more properly be deemed a conclusion of law and any conclusion of law that should more properly be deemed a finding of fact shall be so construed.

I. FINDINGS OF FACT

1. This action arises out of the employment of Plaintiff by Defendants. Defendants employed Plaintiff from approximately June of 1995 to January of 1996.

2. The Parties. Mie Makita Helffrich ("Plaintiff") is a permanent resident alien of the United States. At the time of her employment, she had an "F-1" student visa and a work authorization that permitted her to be employed in the United States until January 28, 1996.

3. Atlantis Submarines, Inc., and Atlantis Submarines Hawaii, Inc. are corporations licensed to conduct business in the State of Hawaii. Atlantis Submarines Hawaii LP is a limited partnership licensed to conduct business in the state of Hawaii (Atlantis Submarines, Inc., Atlantis Submarines Hawaii, Inc., and Atlantis Submarines Hawaii LP collectively to be known as "Defendants" or "Atlantis"). Atlantis Submarines Inc. and Atlantis Submarines Hawaii, Inc. are the owners of the vessels upon which Plaintiff was employed as an attendant.

4. Factual Background of Plaintiff's Employment. On March 23, 1995, Plaintiff applied for employment with Atlantis as a ticketing agent. Def. Exh. 26.

5. Defendants noted, at the time of Plaintiff's application that Plaintiff was only authorized to work in the United States until January 28, 1996. Def. Exh. 28. Plaintiff testified that Atlantis promised to assist Plaintiff in obtaining future work authorization. George Ann Skandis, Atlantis Director of Human Resources, testified that Plaintiff was never told that Atlantis would assist her in obtaining future work authorization, and that Plaintiff

was advised that obtaining any future work authorization would be her sole responsibility. The Court finds the testimony of George Ann Skandis to be persuasive as it conforms with the law and the evidence that it was Plaintiff Is responsibility to obtain future work authorization. Def. Exh. 56.

6. On June 1, 1995 Atlantis sent Plaintiff an offer letter for employment,'dated May 31, 1995, for the full-time position of Japanese Attendant. Def. Exh. 31, 32. The offer letter specifically stated that employment with Atlantis is strictly "at will." Def. Exh. 32. Plaintiff signed and dated the offer letter on June 2, 1995. Def. Exh. 32.

7. On June 6, 1995, Atlantis human resource generalist, Joycee Wong, instructed Plaintiff to present two pieces of identification at the new hire orientation. Def. Exh. 34. Plaintiff presented a Hawaii Driver's License and a Social Security Card. Written in capital letters on the Social Security Card was the statement "VALID FOR WORK ONLY WITH INS AUORIZATION." Def. Exh. 35.

8. On July 10, 1995 Plaintiff received a certificate for

completing the Atlantis training program as an attendant. Def. Exh. 41.

9. An attendant's job duties include preparing the Submarine for the customers, cleaning the interior of the submarines narration in both English and Japanese, opening and closing the hatch of the submarine, and assisting in hooking a tug boat to the submarine. Def. Exhs. 44, 45.

10. Factual Background of Plaintiff's Injury. The hatch of the submarine is around door-like cover to the entry/exit portal of the submarine that is located on the top of the submarine. See Plaintiff's ("Ptf.") Exh. 8. The hatch opening is the main entry and exit to the submarine for passengers and crew. To exit the submarine, passengers and crew must climb up a step ladder and go through the hatch opening.

11. Before passengers exit, the attendant must open the hatch. According to the testimony of a physical therapist familiar with the hatch, Gaye Gunter, and Atlantis' Director of Safety, Paul Dyson, there is no correct method to open the hatch. There are, however, two methods which are more commonly used by Atlantis

employees. The "dead-lift method" involves walking up the step ladder to the hatch, unsealing the hatch by turning the spindle, placing one's shoulder under the partially open hatch, and opening the hatch to a 90 degree angle by walking up the ladder with the weight of the hatch on one's body. The "momentum method" involves walking up the step ladder to the hatch, unsealing the hatch by turning the spindle, pulling the hatch slightly inward after it has been unsealed in order to utilize the spring that connects the hatch to the submarine, and then using the momentum of the expanding spring to propel the hatch outward. The design is that of a standard submarine hatch.

12. The Court finds the testimony of Gaye Gunter, that there is no "correct" method to open the hatch, persuasive. Rather than there being one correct method, Gunter testified that each person should use the method most comfortable to them according to their body type and strength.

13. No other Atlantis employee on any of its 12 submarines worldwide has reported injuries caused by opening the hatch. Jeri Mullin, an Atlantis employee, however, testified that she

had an injury that was aggravated by opening the hatch.

14. Plaintiff testified that she used the dead-lift method to open the hatch. After commencing her employment and qualifying as an attendant, Plaintiff was required to open the hatch approximately 5 times a day, approximately 4 or 5 days a week.

15. Plaintiff first reported pain in her right shoulder and arm on October 2, 1995. Def. Exh. 46. Plaintiff testified that she injured her right shoulder through repeatedly opening the hatch of the submarine.

16. On November 7, 1995, Dr. Brian Mihara of Straub Clinic examined Plaintiff for pain in her shoulder area. Ptf. Exh. 3 at 27.

17. On November 14, 1995, Dr. Mihara recommended light duty work and physical therapy for Plaintiff. Ptf. Exhs. 3 at 26-27. Plaintiff and Jeri Mullin testified that Plaintiff was placed on light duty in the fall of 1995. She spent some of the time doing translations on shore and with reduced duties as an attendant off shore. On December 12, 1995, Plaintiff reported to Dr. Mihara that Atlantis still required her to work as an attendant which included

closing a hatch once but did not include forcing it with her shoulder. Ptf. Exh. 3 at 22. On January 16, 1996, Plaintiff reported to Dr. Mihara that although she was still on light duty, she was being pressured into performing duties that included lifting buckets of water. Ptf. Exh. 3 at 18. Dr. Mihara's notes do not include complaints by Plaintiff that she was required to open the submarine hatches while on light duty. Ptf. Exh. 3 at 22.

18. From December 12, 1995 to December 22, 1995, Plaintiff took a leave of absence from work to rest her shoulder. Ptf. Exh. 3 at 21, 22. Plaintiff reported no improvement to her shoulder condition after taking her leave of absence. Ptf. Exh. 3 at 21.

19. On December 19, 1995, Dr. Mihara ordered that beginning Friday, December 22, 1995, Plaintiff perform sedentary work only. Ptf. Exh. 3 at 21. Plaintiff testified that she worked as an attendant during this period. Plaintiff testified clearly about a singular incident where she felt pressured into opening the hatch. Her testimony that she was required to open the hatch occasionally while on light duty was less clear. Shinichi Louis' testimony was

particularly unpersuasive, however, as his answers were evasive and qualified.

20. Jeri Mullin, Plaintiff's supervisor, testified that she informed Plaintiff's coworkers that Plaintiff was on light duty. Mullin also testified that when Plaintiff complained that she felt pressured to perform other than light duties and to open the hatch on two occasions, Mullin spoke to the appropriate employees in order to inform them of Plaintiff's work status. The Court finds that Atlantis made reasonable efforts to accommodate Plaintiff with light duty work.

21. Plaintiff testified that on January 16, 1996 she did not return to work on her doctor's orders to avoid further aggravation of her injury. Ptf. Exh. 3 at 18.

22. Atlantis took numerous steps to accommodate Plaintiff's limitations due to injury. on January 18, 1996, Charlie Camacho, Atlantis Operations Manager for Waikiki, sent a letter to Aimee Drewry confirming their conversation that shore duties would be arranged for Plaintiff. Def. Exhs. 47; Ptf. Exh. 60. Camacho stated that Plaintiff could be again temporarily used on

shore to do translations. Def. Exh. 47. Camacho also explicitly stated, "[a] t no time will she be required to go offshore until we receive the Doctors (sic] release of 100% recovery from her injury." Def. Exh. 47.

23. On January 19, 1996, after speaking with Camacho, Drewry called Plaintiff to inform her of the light duties that had been arranged for her. Drewry's notes from this telephone conversation reflect that she felt that Plaintiff was hiding something with regard to her work at Atlantis. Ptf. Exh. 60.

24. On January 22, 1996, Drewry spoke with Jeri Mullin who ,told Drewry that both she and Camacho wanted to move Plaintiff to the position of ticketing agent. Ptf. Exh. 60.

25. On January 22, 1996, Drewry called Plaintiff to tell her about the ticketing agent position. Plaintiff "was a little negative" when asked about her interest in the position, and told Drewry that she would get back to her. Ptf. Exh. 60. Drewry again noted she believed that Plaintiff was being secretive. Ptf. Exh. 60.

26. On January 22, 1996, Aimee Drewry faxed a letter to Dr. Mihara requesting that Plaintiff be placed on light duty. Def.

Exh. 48. The letter outlined the temporary office work that Atlantis arranged for Plaintiff, and that Plaintiff had been notified of the availability of the work. Def. Exh. 48.

27. Also on January 22, 1996, Aimee Drewry faxed to Barbara German of Dr. Mihara's office a memo confirming a conversation that they had discussing possible full-time work for Plaintiff. Drewry requested that German have Dr. Mihara review the two-page job description for "ticketing agent" that was attached to the fax, and evaluate whether Plaintiff would be able to perform those duties. Def. Exhs. 49, 50.

28. On a work status slip dated January 21, 1996 Dr. Mihara approved Plaintiff for modified duty. Ptf. Exh. 3 at 67, 73, 74. Plaintiff questions the authenticity of this document which purports to return Plaintiff to modified duty from off duty work status as the date, January 21, predates any request by Atlantis to return Plaintiff to modified duty. The Court has reviewed the January 21 work status slip and all other relevant evidence and finds that the date of the slip is incorrect. The Court finds the date to be the result of human error. In light of the overwhelming evidence of

interaction between Atlantis and Straub Medical personnel it is clear the correct date is January 23. The Plaintiff was returned to modified duty as a result of Atlantis' arrangement of appropriate duties for her physical abilities. The Court finds that Plaintiff was returned to modified duty by Dr. Mihara on January 23, 1996. Ptf. Exh. 60.

29. On Tuesday, January 23, 1996, Atlantis Claims Administrator, Aimee Drewry telephoned Plaintiff and told her that she could return to work as Atlantis had arranged light duties for her, and that Dr. Mihara had cleared the proposed light duties. After checking with Plaintiff, Aimee Drewry scheduled Plaintiff to resume working on Thursday, January 25, 1996. Ptf. Exh. 60, at A000013. Plaintiff did not return to work on Thursday or Friday. Ptf. Exh. 60.

30. Plaintiff admitted in her testimony that Drewry contacted her to inform her that modified duties had been arranged for her. Plaintiff also testified that she understood that Drewry wanted her to return to work, but does not recall scheduling work for Thursday, January 25, 1996. Plaintiff testified that she told

Drewry that before she returned to work, she wanted to confirm with Dr. Mihara that it was appropriate.

31. After speaking with Aimee Drewry, Plaintiff testified that she telephoned and left a message at Dr. Mihara's office for Dr. Mihara to call her back in order to confirm that she was cleared to return to work. Dr. Mihara did not return her call, and Plaintiff made no further efforts to clarify her work status.

32. The Court finds that Plaintiff did not report to work as scheduled on Thursday January 25, 1996 even though Atlantis had arranged light duty work for her that was approved by her doctor.

33. Factual Background of Plaintiff's Termination.

Plaintiff certified that Atlantis promised to assist her in obtaining future authorization. Joycee Wong, Atlantis Human Resources Generalist, testified at her deposition that in a series of conversations beginning in October of 1995, she told Plaintiff that it was the employee's responsibility to obtain the proper work authorization and that Atlantis could make no promises to assist

Plaintiff. Ptf. Exh. 20 at 11, 14, 16, 19; Def. Exh. 56. The Court finds the testimony of Joycee Wong persuasive because of the corroborating evidence before the Court. Def. Exh. 56; Ptf. Exh. 23.

34. In a letter to Plaintiff dated November 2, 1995, from Jeri Mullin, Plaintiff's Supervisor at Atlantis, Mullin also directed Plaintiff to begin her efforts to obtain her future work authorization, and that it was Plaintiff's responsibility to obtain the proper paperwork and then present it to Atlantis' human resources office at the Pan Am Building. Ptf. Exh. 23.

35. On January 22, 1996, Atlantis Director of Human Resources, George Ann Skandis, spoke to Plaintiff on the telephone and sent a letter to Plaintiff confirming the telephone conversation reminding Plaintiff that her employment authorization card would expire on Sunday, January 28, 1996. As Skandis had told Plaintiff in the telephone conversation, the letter also stated that Plaintiff's employment would be terminated on January 28, 1996, unless Plaintiff provided proper work authorization documents. Def. Exh. 51.

36. There is disputed testimony as to the conversations between Plaintiff and George Ann Skandis by telephone regarding her employment authorization. Plaintiff testified that during the conversation on January 25, 1996, George Ann Skandis told her that if Plaintiff could produce the proper documentation by January 31, 1996, Atlantis would be able to maintain her employment. Skandis denies that the conversation took place. Such a conversation is inconsistent with all of the documents introduced into evidence. The Court does not find Plaintiff's testimony to be believable. Mullin testified that Plaintiff has a reputation for being untruthful. By Plaintiff's own testimony, she lied about an injury to herself in the process of quitting her employment with Breeze Hawaii, and included that lie on her employment application to Atlantis. Def. Exh. 26.

43. On Friday, January 26, 1996, Plaintiff faxed a copy of work authorization card to Atlantis, late in the afternoon at 4:37 p.m. Ptf. Exh. 20 at exh. 1.

38. On Monday morning, January 29, 1996, George Ann

Skandis saw the fact sent by Plaintiff. The faxed authorization card was unreadable as the face of the work authorization care was essentially blacked out. It was not possible to read anything on the work authorization card. George Ann Skandis immediately called Plaintiff and left a message on Plaintiff's answering machine informing Plaintiff that she should either bring in her original work authorization documents that day or that she should call Skandis as soon as possible.

39. George Ann Skandis testified that if Plaintiff had provided the original of Plaintiff's work authorization, Atlantis have considered rehiring Plaintiff. Rehiring would have been necessary on January 29, 1996, as employing her past the January 28, 1996 authorization date without new authorization would have been a violation of the law. This testimony is consistent with the deposition of Joycee Wong who testified in her deposition that Plaintiff had to produce the new authorization for inspection by January 29, 1996 because employing her past the expiration date of her old authorization card would have been a violation of the law. Ptf. Exh. 20 at 15.

40. Plaintiff did not call or come into the Atlantis office on January 29, 1996. In fact, Plaintiff did not provide a readable copy or the original work authorization to Skandis, the human resource officer for Atlantis, to inspect either prior to January 28, 1996 or subsequent to January 28, 1996.

41. Plaintiff testified that she went to the Atlantis operations department on January 29, 1996 to tell Jeri Mullin that she had a new authorization card. The operations department is at a different location, more than a mile away from the corporate offices at the Pan Am Building. Plaintiff stated that Mullin told her congratulations and that she could still work at Atlantis.

42. Mullin disputes Plaintiff Is testimony. Mullin testified that she did not congratulate Plaintiff. Mullin said that she did not review any work authorization of Plaintiff's on January 29, 1996, and that she was surprised to see the Plaintiff at the operations office. Mullin testified that she had previously directed Plaintiff to he human resources office for matters her work authorization status. Ptf. Exh. 23.

43. The Court finds that Plaintiff did not comply with the

requirement that she produce for inspection the original of her new work authorization documents to George Ann Skandis, Atlantis Director of Human Resources.

44. The Court also finds from all of the testimony, Plaintiff's behavior, and documents before the Court that Plaintiff was unwilling to work the week of January 22, 1996.

45. On January 30, 1996, Atlantis Operations Manager for Waikiki, Charlie Camacho, sent Plaintiff a letter stating that her employment with Atlantis was terminated as she did not provide the proper work authorization documentation. Def. Exh. 52. Plaintiff testified that she received the letter on January 31, 1996. After receipt of the letter, Plaintiff never called Atlantis or contacted anybody connected with Atlantis regarding her continued employment with Atlantis or her work authorization.

46. Plaintiff testified that she did not telephone Atlantis or attempt to contact Atlantis because she was emotionally distraught. The Court finds this testimony unpersuasive.

47. After Plaintiff's termination, Plaintiff filed for

unemployment with the Unemployment Insurance Division of the State of Hawaii. Def. Exh. 53. Her claim was subsequently denied on March 12, 1996, and her appeal of the denial of her claim was denied on April 11, 1996. Def. Exhs. 53-55.

48. Continued Treatment of Plaintiff. Plaintiff continued to receive treatment from Dr. Mihara until August 13, 1996. At that time, Plaintiff reported to Dr. Mihara that she did not notice any improvement over the last half year. Ptf. Exh. 3 at 3. She stated, however, that she did not want to close the case as she was considering legal action against Atlantis. Ptf. Exh. 3 at 3.

49. On August 26, 1996, Plaintiff began receiving treatment from Portner Orthopedic Rehabilitation, Inc. on a referral by her attorney. Ptf. Exh. 1 at 12. On her patient questionnaire, Plaintiff listed pain in her neck in addition to the shoulder pain that was being treated by Dr. Mihara at Straub. Ptf. Exh. 1 at 25. In a synopsis of Plaintiff's case, dated August 26, 1996, Dr. Carol Treinan and Dr. Portner noted that the Plaintiff had not previously received any therapy for her neck. Ptf. Exh. 1 at 23. Treatment at

Portner Orthopedic Rehabilitation continued until December 27, 1996. Ptf. Exh. 1 at 3.

50. Atlantis paid all medical bills incurred by Plaintiff until December of 1996, when Plaintiff terminated all rehabilitation and treatment for her neck and shoulder injury.

51. Plaintiff testified that treatment for her shoulder injury ceased due to an injury to her lower back. The Court finds persuasive Dr. Bernard Portner's testimony that the neck and shoulder injury and the lower back injury are unrelated, and that the lower back injury intervened and diverted Plaintiff from treatment for her neck and shoulder injury.

52. On May 7, 1998, Plaintiff resumed treatment for her neck and shoulder injury with Portner Orthopedic Rehabilitation. Dr. Bernard Portner of Portner Orthopedic Rehabilitation testified that believes Plaintiff will benefit from approximately two more months of therapy, and that prognosis is pretty good. Additionally, if Plaintiff does not improve after such time, then it is Dr. Portner's opinion that Plaintiff will have reached maximum cure for her shoulder and neck injury.

53. At the close of Plaintiff's case, Atlantis entered into evidence two video tapes by a private investigator from In Photo Surveillance. The videos showed Plaintiff performing various nonstrenuous activities on May 4, 1998 and May 5, 1998. Atlantis alleged that these videos rebutted Plaintiff's testimony that she was unable to carry on her normal physical activities due to her neck and shoulder injury. The Court finds that these videos did not support Atlantis, position. On the contrary, in the videos Plaintiff appeared to be moving slowly and deliberately, consistent with her claim of injury.

II. Conclusions of Law

1. Jurisdiction and Venue. This Court has jurisdiction over this admiralty matter under 28 U.S.C. § 1333.

2. Unseaworthiness. A shipowner has the absolute duty to furnish a seaworthy ship. Mitchell v. Trawler Racer, Inc. 362 U.S. 539, 550 (1960) ; Ribitzki v. Canmar Reading & Bates, 111 F.3d 658, 664 (9th Cir. 1997). Improper training for crewmembers can amount to unseaworthiness. See e.g. In re Liberty Shipping Corp., Motor Ship Don Jose FicTueras, 509 F.2d 1249, 1250 (9th

Cir. 1975).

3. Plaintiff contends that the Atlantis vessels are to the unseaworthy because of the inadequate training given attendants with respect to opening the hatch.

4. There is no one correct method to open the hatch, and the dead lift method demonstrated to Plaintiff and used by her was not necessarily a "wrong" method. The Court finds that various methods of opening the hatch were demonstrated during training of new employees and that such training was proper. The Court finds that the Defendants' vessels were not unseaworthy.

5. Jones Act Negligence. To recover for negligence under the Jones Act, a plaintiff must establish by a preponderance of the evidence:

> (1) negligence on the part of his employer (or one for whom the employer is responsible), and
>
> (2) that the negligence was a cause, however, slight, of his injuries.

Havens v. F/T Polar Mist, 996 F.2d 215, 218 (9th Cir. 1993). A plaintiff also must demonstrate that the owner of the vessel knew, or in the exercise of reasonable diligence, should have known of the

unsafe condition. Id. Evidence needed to support a claim for negligence under the Jones Act is lower than evidence required to demonstrate common law negligence; the slightest negligence is sufficient. Ward v. American Hawaii Cruises Inc., 719 F. Supp. 915, 922 D. Haw. 1988) .

6. In light of the facts that there was no correct way to open the hatch, that there have been no other reported injuries caused by opening the hatch, and that the hatch is a standard submarine hatch, the Court finds that Atlantis was not negligent in requiring Plaintiff to open the hatch as a part of her attendant duties, nor was Atlantis negligent in requiring Plaintiff to continue to work as an attendant without having to open the hatch during Plaintiff's light duty status in 1995.

7. In addition, there is conflicting evidence of exactly the types of duties that Plaintiff was required to perform while on light duty, except that she was not required to open the hatch. There is ample evidence, however, that Atlantis made every attempt to accommodate Plaintiff's injury by arranging light duty work for her on two occasions, permitting her to take leave for her injury,

and informing other employees that Plaintiff was not to open the hatch. The Court finds that the Plaintiff has not carried her burden with respect to showing negligence by Atlantis.

8. Maintenance and Cure. Under the ancient doctrine of maintenance and cure, a shipowner is obligated to care for a seaman during her employment. Vaughan v. Atkinson, 369 U.S. 527, 531-33 (1962); Nelsen v. Research Corp. of the University of Hawaii, 805 F. Supp. 837, 853 (D. Hawaii 1992) . Maintenance is the duty of a shipowner to "provide food and lodging to a seaman who becomes ill or injured while in the service of the ship" Ward, 719 F. Supp. at 923 (citing Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528 ~'1938)). Cure payments to the seaman are payments for medical services needed to "cure" the seaman. See e.g. Permanente Steamship) Corp. v. Martinez, 369 F.2d 297, 298-99 (9th Cir. 1966) Nelsen, 805 F. Supp. at 853.

9. Both maintenance and cure extend until the injured seaman reaches maximum medical recovery, that is, until she is well or it appears that her condition will no longer improve. Vaughan, 369 U.S. at 531; Permanente Steamship Corp., 369 F.2d at 298.

The shipowner's duty to pay maintenance and cure extends throughout the seaman's disability irrespective of termination of employment. Crooks v. United States, 459 F.2d 631, 633 (9th Cir. 1972) ; see also Nelsen, 805 F. Supp. at 853.

10. In light of the foregoing law, Plaintiff was entitled to maintenance payments during the period that she was still receiving treatment for her neck and shoulder injury. This period extended from the date of her leave from work for her injury on January 16, 1996 to the date of her last examination by Portner Orthopedic Rehabilitation on December 27, 1996 totaling 347 days.

11. The Court finds persuasive Dr. Portner's unrebutted testimony that Plaintiff will reach maximum cure with approximately two additional months of therapy. Accordingly, the Court also finds that Plaintiff is entitled to maintenance during treatment that resumed May 7, 1998 and to end on June 30, 1998 totaling 55 days.

12. The Court also finds that Plaintiff is entitled to cure payments for the same period in order for her to reach maximum cure, from May 7, 1998 to June 30, 1998.

13. The Court awards maintenance at a rate of thirty-five dollars a day according to Plaintiff's unrebutted testimony of her living expenses and Plaintiff Is counsel's request during argument.

14. To calculate the amount of maintenance due to Plaintiff, the rate of 35 dollars a day is multiplied by the number of days -that she is entitled to maintenance (402 days) Plaintiff is due maintenance in the sum of $14,070 or $35 for 402 days.

15. For cure, Atlantis is to pay medical bills from Portner Orthopedic Rehabilitation relating to the treatment of Plaintiff Is neck and right shoulder injury from May 7, 1998 to June 30, 1998.

16. Attorneys' Fees. A plaintiff may be awarded attorneys, fees if the shipowner had been willful and persistent in its failure to investigate the plaintiff's claim or to pay maintenance. Glynn v. Roy Al Boat Management Corp. 57 F.3d 1495, 1501 (9th Cir. 1995) , cert. denied, 516 U.S. 1046 (1996) ; Kopczynski v. The Jacqueline, 742 F.2d 555, 559 (9th Cir. 1984) , cert. denied, 471 U.S. 1136 (1985) ; Vaughan, 369 U.S. at 530-31.

17. In this case, attorneys' fees are not appropriate as Atlantis promptly investigated Plaintiff's claims and attempted to

provide appropriate work after Plaintiff was injured.

18. Breach of Oral Contract. For a binding contract to exist, there must be mutual assent or a meeting of the minds on all essential terms. Carson v. Saito, 53 Haw. 178, 180 (1971) ; Earl M. Jorgensen Co. v. Mark Construction, Inc., 56 Haw. 466, 470 (1975). The existence of mutual assent is determined by reviewing a party Is words or acts under an objective standard. Earl M. Jorgensen Co., 56 Haw. at 470.

19. Plaintiff testified that she had an oral agreement with Atlantis that Atlantis would assist Plaintiff in obtaining employment authorization past the expiration of her authorization on January 28, 1996. The Court finds that Atlantis never offered or agreed to assist Plaintiff with obtaining future work authorization.

20. As there was no mutual agreement of an essential term of the contract, the services to be provided under the contract, the Court finds that there was no contract. Accordingly, no contract existed and Atlantis did not breach an oral contract with the Plaintiff.

21. Wrongful Discharge. In Hawaii, an at-will

employment contract is terminable at the will of either party, for any reason or without any reason. Parnar v. Americana Hotels, Inc., 65 Haw. 370, 374 (1982).

22. An employer, however, may be liable in tort if the discharge of an at-will employee violates a clear mandate of public policy. Parnar, 65 Haw. at 380; see also Takaki v. Allied Machinery Corp., 87 Haw. 57, 63 (1998). In determining whether a discharge violates a clear mandate of public policy, courts should consider whether the employer's conduct "contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme." Parnar, 65 Haw. at 380. The plaintiff bears the burden of proving that a discharge violates a clear mandate of public policy. id.

23. If an employee's work authorization is to expire, the employee must present to the employer the document showing continuing eligibility to work in the United States or a new grant of work authorization, no later than the date that her work authorization expires. 8 C.F.R. § 274 a.2 (b) (1) (vii). Employment of an alien without work authorization is a violation of 8 U.S.C. § 1324a (a) (2) , which may result in an order to cease and desist

and/or to pay monetary fines. 8 C.F.R. §§ 274 a.3, 274a .12.

24. The Court finds that Atlantis' termination of Plaintiff did not violate a clear mandate of public policy as continuing to employ Plaintiff past January 28, 1996 without proof of further work authorization would be a violation of 8 U.S.C. § 1324a.

25. Intentional (or Negligent) Infliction of Emotional Distress. For intentional infliction of emotional distress, a plaintiff must demonstrate that the act complained of is outrageous in that it exceeds all bounds of decency and is utterly intolerable in a civilized community. Ross v. Stouffer Hotel Company (Hawaii) Ltd., Inc., 76 Haw. 454, 465 (1994) (quoting Restatement (Second) of Torts §46, comment d (1965) Dunlea v. Dappen, 83 Haw. 28, 38 (1996).

26. For negligent infliction of emotional distress, a plaintiff must demonstrate that he suffered serious mental distress engendered by the circumstances of the case, with which a reasonable man, normally constituted, would be unable to adequately cope. Masaki v. General Motors Corp., 71 Haw. 1, 17 (1989) recon. denied, 71 Haw. 664 (1989); see also, Rodrigues v. State of Hawaii, 52 Haw. 156, 173 (1970).

27. Although intentional and negligent infliction of emotional distress are independent torts, there must still be some underlying intentional or negligent action undertaken by the defendant in order to support the emotional distress claims. Calleon v. Miyagi, et al., 76 Haw. 310, 320 (1994)

28. Atlantis has not engaged in any negligent, intentional, or outrageous behavior directed against Plaintiff. Additionally, the Court finds that Plaintiff has failed to demonstrate that she has suffered severe emotional distress. Accordingly, Plaintiff cannot maintain a claim for either intentional or negligent infliction of emotional distress.

29. Punitive Damages. Punitive damages are those damages which are awarded in addition to compensatory damages in order to punish the "defendant for aggravated or outrageous conduct and to deter the defendant and others from similar conduct in the future." Masaki, 71 Haw. at 6 (citing D. Dobbs, Handbook on the Law of Remedies, § 3.9, at 204 (1973); Restatement (Second) of Torts § 908 (1979)) . Such damages are only appropriate when the egregious nature of the defendant's

wrongdoing warrant punishment. Masaki, 71 Haw. at 6.

30. Under Hawaii law, imposition of punitive damages are only justified where the plaintiff proves by clear and convincing evidence that the wrongdoer has acted "wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations; or where there has been some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences." Masaki, 71 Haw. at 12-13 (internal citations omitted) (citing Harrington, 59 Haw. 652, 660-61 (1978)); Amfac, Inc. v. Waikiki Beachcomber Investment Company, 74 Haw. 85, 138 (1992) . The "inquiry focuses primarily upon the defendant's mental state, and to a lesser degree, the nature of his conduct." Masaki, 71 Haw. at 7 (citations omitted).

31. The Court finds that Plaintiff has failed to demonstrate any conduct by Atlantis which would warrant punitive damages.

III. ORDER

Based on the evidence adduced at trial, and the Findings of

Fact and the Conclusions of Law stated herein, it is hereby ORDERED, ADJUDGED AND DECREED:

1. Atlantis was not negligent in supervising or training Plaintiff.

2. Atlantis' vessels were not at any time unseaworthy due to alleged inadequate training of how to open the hatches.

3. Plaintiff is entitled to fourteen thousand seventy dollars and no cents ($14,070.00) for past and future maintenance.

4. Atlantis must make cure payments to Dr. Portner for Plaintiff's treatment for her neck and shoulder injury to end on June 30, 1998.

5. Plaintiff is not entitled to attorneys' fees.

6. As there was no contract between Plaintiff and Atlantis that Atlantis would assist Plaintiff in obtaining future work authorization, there was no breach of a contract by Atlantis.

7. Atlantis did not wrongfully discharge Plaintiff.

8. Plaintiff has not demonstrated that there were outrageous acts by Atlantis that caused her emotional distress for her claim of intentional infliction of emotional distress, nor that she

has -suffered severe emotional distress for her claim of negligent infliction of emotional distress.

9. An award of punitive damages is not appropriate in this case as Plaintiff has not demonstrated the requisite mental state or actions by Atlantis.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, June 2, 1998.

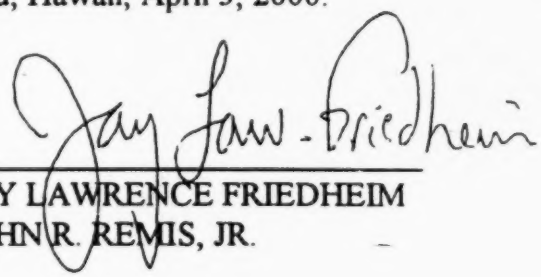
/s/ Helen Gillmor
United States District Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 3, 2000 three true and complete copies of Petitioner's Petition for Writ of Certiorari in the above-captioned matter, were duly served upon the following parties to their last known addresses through the United States Post Office, first-class postage prepaid:

Michelle Nelson
Lesser & Associates
733 Bishop St., 2400 Makai Tower
Honolulu, HI 96813
Attorney for Defendants-Appellees

DATED: Honolulu, Hawaii, April 3, 2000.



JAY LAWRENCE FRIEDHEIM
JOHN R. REMIS, JR.